TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 204.

J. L. MURPHY, PLAINTIFF IN ERROR,

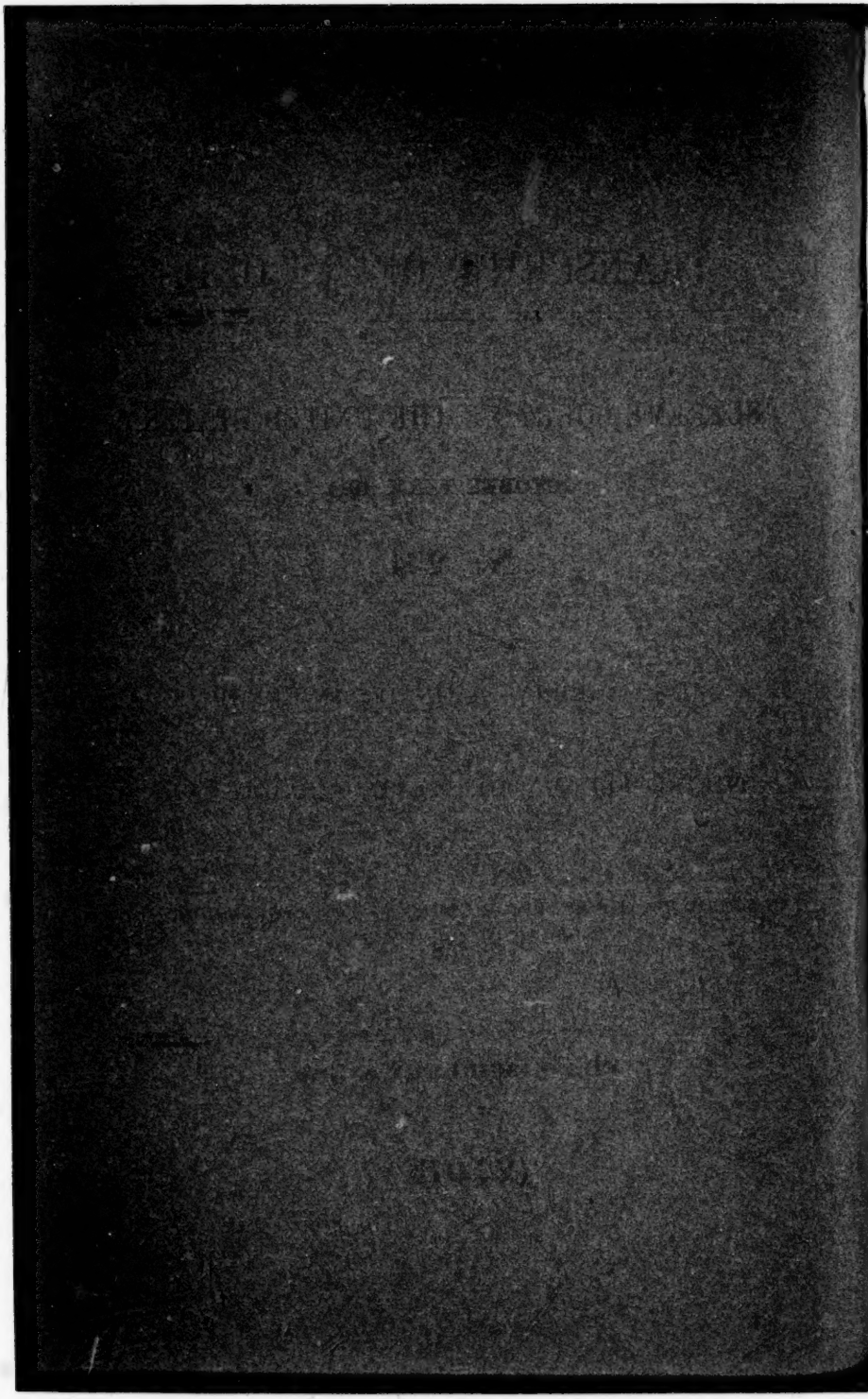
vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA.

FILED FEBRUARY 8, 1910.

(22,013.)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1911.

1 In the Recorder's Court of South Pasadena, County of Los Angeles, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
J. L. MURPHY, Defendant.

Statement on Appeal.

Be it remembered that the above entitled action came on regularly for trial on the 1st day of September, 1909, before Hon. J. B. Soper, Recorder of said Court, without a jury, a jury trial having been expressly waived by all the parties. John E. Carson, Esq., appeared as attorney for the People. The defendant appeared in person and by his attorneys E. C. Bower, Esq., and H. C. Millsap, Esq.; and thereupon the following proceedings were had:

It was stipulated by and between the respective parties in said above entitled action,

That on the 18th day of January, 1908, a complaint was made before O. W. Orcutt, Recorder of said City of South Pasadena at said time, charging that on the 17th day of January, 1908, at said City of South Pasadena, County of Los Angeles, State of California, the crime of violating Ordinance No. 262 of said City of South Pasadena was committed by said J. L. Murphy, which said complaint was in the words and figures as follows, to-wit:

2 In the Recorder's Court of South Pasadena City, in the County of Los Angeles, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
J. L. MURPHY, Defendant.

Complaint.

Criminal.

Personally appeared before me, this 18th day of January, 1908, W. H. Johnston of the County of Los Angeles, who being first duly sworn, on oath, complains and says: That on the 17th day of January, 1908, at the City of South Pasadena, in the County of Los Angeles, State of California, the crime of violating Ordinance No. 262 of said City of South Pasadena was committed by J. L. Murphy, who, at the time and place last aforesaid, did willfully and unlawfully engage in, establish open, keep, carry on and assist in carrying on, maintain and assist in maintaining a billiard hall, pool room and place by then and there keeping billiard, pool and combination billiard and pool tables for hire and public use.

All of which is contrary to the form of the Ordinances in such cases made and provided, and against the peace and dignity of the People of the State of California. Said complainant therefore prays that a warrant may be issued for the arrest of the said J. L. Murphy and that he may be dealt with according to law.

W. H. JOHNSTON.

Subscribed and sworn to before me this 18th day of January, 1908.

O. W. ORCUTT,
Recorded of South Pasadena City, County of Los Angeles, State of California.

Witnesses:

W. H. JOHNSTON.
BOB McCUTCHEON.

3 It was further stipulated that on the 18th day of January, 1908, said Recorder in pursuance of said complaint issued a warrant authorizing and directing the arrest of said J. L. Murphy for the offense charged in said complaint, and thereupon said J. L. Murphy was, in pursuance of said warrant, arrested. That on the 30 day of January, 1908, said defendant was arraigned, and at said time said defendant demurred to said complaint on the ground that said complaint did not state facts sufficient to constitute a public offense in that the ordinance under which said complaint was drawn is repugnant to the Constitution of the United States, which said demurrer was overruled by said recorder, and said defendant entered a plea of not guilty, and was thereupon admitted to bail.

W. L. Cox, a witness sworn on behalf of the People.

Prior to the giving of any testimony by said witness the defendant interposed the following objection. The defendant objects to the introduction of any testimony in this case on the ground that the facts stated in the complaint are not sufficient and do not constitute any public offense whatever. That the Ordinance #262 of the City of South Pasadena which the defendant is charged with violating is unconstitutional and void in that it is repugnant to the Constitution of the United States, and violative of Section I, Article I of the Constitution of California, is special and class legislation in that a classification is created thereby not dependent upon a natural intrinsic or constitutional reason.

Objection overruled.

Exception by defendant. Exception No. 1.

Witness Cox testified as follows:

I am the City Clerk of South Pasadena, and am the custodian of the books containing the ordinances adopted by said City of South Pasadena.

On January 14th, 1908, an ordinance was duly and regularly

passed and adopted by said City of South Pasadena, the
4 same being Ordinance No. 262, which said Ordinance is set forth in full in Ordinance Book No. 3, which I now have in my possession.

Counsel for people offers in evidence Ordinance identified by witness as Ordinance No. 262, which said Ordinance is in the words and figures following:

5 *Ordinance No. 262.*

An Ordinance for Police Regulation, Relating to Billiard Halls, Pool Rooms, and Places Where Billiard, Pool, or Combination Billiard and Pool Tables are Kept for Hire or Public Use in the City of South Pasadena.

The Board of Trustees of the City of South Pasadena do ordain as follows:

SECTION 1. It shall be, and is hereby, made unlawful for any person or persons, individually or by association with others, either as owner, principal, clerk, agent, servant or employee to establish, open, keep, carry on, or assist in carrying on, or maintain, or assist in maintaining any billiard hall, or pool room, or other place in the City of South Pasadena, where any billiard, pool, or combination billiard and pool table, or tables, is or are kept for hire or public use, and any person or persons, opening, keeping, carrying on, or assisting in carrying on, maintaining, or assisting in maintaining, any such place, herein specified, in said City of South Pasadena, shall be guilty of a misdemeanor, and every act in violation of this section shall separately, or for each day of its continuance, be deemed a separate offense.

Provided, however, that nothing in this ordinance shall be construed or understood as prohibiting the owner, manager, or lessee of any hotel, universally recognized as a hotel, using a general register for guests, and having twenty-five bed-rooms and upwards, furnished as such, from keeping and maintaining any billiard, pool or combination billiard and pool table, or tables for the use of regular guests only of said hotel, in a room provided for that purpose in the building in which said hotel is located, and at no other place, or receiving a permit so to do, from the Board of Trustees of the City of South Pasadena. Applications for such permits shall be in writing, and filed with the Board of Trustees at least five days before the same is granted. If on investigation said Board finds the hotel for which such permit is desired, equipped and conducted as herein specified, it may, in its discretion, grant and issue such permit, without charge, and for such time as desired by the applicant, but in no event to extend beyond the date of the next succeeding municipal election; provided, if said Board of Trustees shall at any time become satisfied that any person to whom any such permit is granted, his clerk, agent or employee has permitted any person other than a regular guest of said hotel, or any person who has not in good faith become a regular guest of said

hotel, or is guilty of a violation of any provision of this ordi-
6 nance, they shall cancel, revoke and withdraw such permit and all rights thereunder, and no other permit shall thereafter be granted to said person.

SECTION 2. Any clerk, servant, agent, employee, or person committing any act in violation of any of the provisions of this Ordinance shall be deemed guilty as principal.

SECTION 3. Every person taking out or having taken out a license for any business for which a license is required by the City of South Pasadena, who shall be convicted of establishing, keeping, or maintaining a place where any billiard, pool or combination billiard and pool table, or tables is or are kept contrary to the provisions of this ordinance, shall, in cases where such unlawful place has been established, kept or maintained, or said unlawful act has been done in connection with said lawful business, forfeit such license and no new license for such lawful business shall be issued to said person during a period of one year thereafter.

SECTION 4. Every person found guilty of a violation of any of the provisions of this ordinance shall be fined in the sum of not less than twenty-five dollars, nor more than three hundred dollars, or shall be imprisoned in the city jail of the City of South Pasadena, or in the county jail of the County of Los Angeles, for not more than three months, or by both such fine and imprisonment, and every judgment of fine for violation of any of the provisions of this ordinance shall direct that in default of payment of such fine, or any part thereof, the person shall be imprisoned in the city jail of the City of South Pasadena, or in the County Jail of the County of Los Angeles, until the fine is satisfied, in the proportion of one day's imprisonment for every two dollars of such fine remaining unpaid.

SECTION 5. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

SECTION 6. The City Clerk shall attest this ordinance and cause the same to be published once in the South Pasadenan, a newspaper published and circulated in said City of South Pasadena, and thereupon and thereafter this ordinance shall be in full force and effect.

Passed and approved by the Board of Trustees of the City of South Pasadena this 13th day of January, 1908, by the following vote:

Ayes—Axtman, Hargrave, Perkins, Pridham and Taylor.
Noes—None.

R. W. PRIDMAN,
President of the Board of Trustees of the City of South Pasadena.

Attest:

ALEXIS HINCKLEY,
Clerk of the City of South Pasadena.

7 Said Ordinance was offered in evidence by the people, to the introduction of which the defendant objected upon the

ground that said Ordinance is void for the reason that the same is repugnant to the Constitution of the United States, and is violative of Section 1, Article 1 of the Constitution of California, is special and class legislation in that a classification is created thereby which is not dependent upon a natural intrinsic or constitutional reason. That said Ordinance is incompetent, irrelevant and immaterial for any purpose in this case.

Objection overruled, to which defendant excepted. Exception No. 2.

W. H. JOHNSTON sworn as a witness on behalf of the people testified as follows:

I am now and was on the 17th day of January, 1908 the acting City Marshal/ of the City of South Pasadena. That on the 18th day of January, pursuant to a warrant issued from the Recorder's Court of South Pasadena City in the County of Los Angeles, State of California, I arrested the defendant J. L. Murphy. That said J. L. Murphy was at said time engaged in the conducting of a public pool and billiard hall in the City of South Pasadena at 911 Center Street. That said public pool and billiard hall was not connected with or as a part of any hotel.

That said testimony of Johnston was received over the objection of the defendant that the same was incompetent, irrelevant, and immaterial, and at the conclusion thereof a motion was made to strike out all the testimony of said Johnston on the ground that the same was incompetent, irrelevant and immaterial in that it failed
8 to establish any offense, and in that the offense described was one created by an Ordinance which is void, being repugnant to the Constitution of the United States, which said objection to testimony and motion to strike out was by the Court denied, to which the defendant excepted. Exception No. 3.

The foregoing constitutes all the testimony offered by the people.

The defendant J. L. MURPHY was sworn as a witness in his own behalf, and testified as follows:

I am the defendant in the above entitled action, and a male citizen of the United States, and was on the 18th day of January, 1909, and for some time prior thereto had been, a resident of the City of South Pasadena, County of Los Angeles, State of California. That for several years preceding 1908, I was engaged in the business of conducting a public pool and billiard hall, and by said business provided a livelihood for myself and family.

That on the 1st day of January, 1908 I lease[1] the premises 911 Center Street in the City of South Pasadena, and fitted up the place for the purpose of carrying on a public pool and billiard hall in said City of South Pasadena. I expended about Three Thousand Dollars fitting up said business, in buying said pool and billiard tables, and the necessary equipment, and in furnishing said room, and in preparing to conduct and carry on said business, and establishing said business. At the time I procured my lease on said premises and pur-

chased said property necessary to equip said room for the conduct of said business there was no Ordinance or law in said City of South Pasadena prohibiting the conducting of said business.
That Ordinance No. 262 was adopted and passed after I commenced the operation of my business in said City.

Said witness further testified over the objection of Counsel for the people subject to a motion to strike out as follows:

The said pool and billiard hall was equipped with new tables and new furnishings and was in every respect neat and sightly. That the place where said business was established, to-wit: 911 Center Street was at all times kept in a perfect sanitary condition, and at no time had there been anything about said premises, or the manner of conducting said business which in the least could or would be offensive to the senses. That said business was patronized only by the business men and the best people of South Pasadena as a source by them of recreation and amusement. That there was at no time any loitering or lounging around on said premises, nor were there any persons of bad character permitted on said premises or allowed to play at said games. No gambling or betting of any kind was allowed in said place of business, nor were any unlawful acts of any kind done, allowed or permitted on said premises, but said business was conducted on strictly lawful and moral lines, and there was nothing in the conduct of said business or the manner in which it was carried on, or the conduct of those who frequented said place of business or played at said games, which had any tendency to immorality or in the least could in any way effect the health, comfort, safety or morality of the community, or of those who frequented said place of business. That said premises are located in the business part of South Pasadena, and surrounded only by business buildings and vacant lots, and there is no residence within seven hundred feet of said premises. That said place of business was carried on and conducted in a quiet and peaceable manner, and without any boisterous or unusual noise of any kind, and the conduct of all persons who visited said place is and was quiet and peaceable. That no noise of any kind whatever is made in the operation of said business which could be heard outside of the room in which said business is conducted.

Counsel for the people moved to strike out the foregoing testimony of J. L. Murphy upon the ground that the same is incompetent and immaterial and irrelevant, it being immaterial as to the manner in which defendant conducted the business.

Said motion was by the court granted, to which said ruling the defendant excepted. Exception No. 4.

The defendant then offered to prove by the witness all the facts and statements of the witness which had been stricken out, and further offered to prove that the business as conducted by Murphy was conducted in such a manner that it could not and did not effect in any respect or particular the health, comfort, safety, or morality of the community or any part thereof in which said business was conducted, or of those who frequented said place of business; to

which said offer the people objected on the ground that the same was incompetent, irrelevant and immaterial, which said objection was sustained, and to which defendant excepted. Exception No. 5.

Witness further testified that South Pasadena is a City of about 5,000 inhabitants, and that there exists within its corporate limits the Raymond Hotel and the Capitola Hotel, and that there is no other hotel in operation in said City universally recognized as a hotel using a general register for guests and having twenty-
11 five bed rooms and upwards, furnished as such.

Since the adoption of said Ordinance it is impossible for me to dispose of my lease, or the equipment of said pool and billiard hall without great loss, and by reason of said Ordinance, the investment made by me is rendered valueless. Since my arrest I have been deprived of the use of said property.

The evidence closed.

The defendant by his attorney then moved the court to discharge the defendant on the ground that the complaint does not charge or state facts sufficient to constitute a public offense because the denomination of the offense is not charged, and for the reason that the said Ordinance No. 262 is void in that it is repugnant to the provisions of Section I, Article 14 of Amendments to the Constitution of the United States.

The Court denied the motion, to which ruling the defendant excepted. Exception No. 6.

The foregoing constitutes all the evidence offered in the above entitled action, whereupon the case was submitted to the Court for consideration, after which said Court on the 1st day of September, 1909 found the defendant guilty as charged, and at the request of defendant fixed Friday, September 3rd, at the hour of 9:30 o'clock A. M. as the time for sentence.

On September 3rd, 1909 defendant appeared in Court with counsel and moved the court in arrest of judgment and for a new trial, which said motions are in the words and figures following, to-with:

12 Title of Court and Cause.

Motion in Arrest of Judgment.

The defendant moves the court in arrest of judgment on the ground that the complaint filed in said action does not state facts sufficient to constitute a public offense.

First. Because the denomination of the crime is not charged, and

Second. That said Ordinance No. 262 is void, because it is repugnant to Section I, Article 14, Amendments to the Constitution of the United States.

E. C. BOWER,
H. C. MILLSAP,
Attorneys for Defendant.

The Court denied the motion, and the defendant excepted. Exception No. 7.

Title of Court and Cause.

Motion for New Trial.

The defendant in the above entitled action hereby moves the court to set aside the decision heretofore rendered herein, and grant defendant a new trial upon the following grounds, to-wit;

First. On the ground that there has been error in the decision of the Court given on questions of law arising during the course of the trial.

Second. On the ground that the decision is contrary to law, and contrary to evidence.

13 The motion for a new trial herein will be made and based upon the papers and records on file herein, and upon the testimony offered at said trial.

E. C. BOWER,
H. C. MILLSAP,
Attorneys for Defendant.

The Court denied the motion for a new trial, to which ruling the defendant excepted. Exception No. 8.

Judgment was then pronounced upon said defendant imposing a fine of One Hundred Fifty ($150.00) Dollars, and that said J. L. Murphy in default of payment of said fine be imprisoned in the County Jail of Los Angeles County, until said fine be satisfied at the rate of one day's imprisonment for each two dollars of said fine; Said term of imprisonment not to exceed seventy-five days.

Specifications of Error.

1. The court erred in overruling defendant's demurrer to the complaint.
2. The court erred in its ruling to which Exceptions I, II, III, IV, V, VI, VII, VIII were taken.
3. The evidence is insufficient to justify the decision.
4. The decision is against law.

E. C. BOWER,
H. C. MILLSAP,
Attorneys for Defendant and Appellant.

14 The foregoing statement contains all the evidence introduced in the above entitled action, also the rulings of the Court that were excepted to by defendant, and is this 3rd day of September, 1909, settled, engrossed, and approved, by me, the undersigned Recorder of said above entitled Court.

J. B. SOPER,
Recorder of South Pasadena City,
County of Los Angeles, State of California.

(Endorsed:) In the Recorder's Court of South Pasadena City County of Los Angeles, State of California. People of State of California, Plaintiff, against J. L. Murphy, Defendant. Statement on Appeal. Filed Sep. 13, 1909, C. G. Keyes, Clerk, by J. H. Cowdery, Deputy. H. C. Millsap and E. C. Bower, 400½ Currier Building, Los Angeles, California, Attorneys for Defendant.

15 In the Recorder's Court of South Pasadena, County of Los Angeles, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
against
J. L. MURPHY, Defendant.

Motion in Arrest of Judgment.

The defendant moves the court in arrest of judgment on the ground that the complaint filed in said action does not state facts sufficient to constitute a public offense.

First. Because the denomination of the crime is not charged, and

Second. That said Ordinance No. 262 is void, because it is repugnant to Section I, Article 14, of Amendments to the Constitution of the United States.

E. C. BOWER &
H. C. MILLSAP,
Attorneys for Defendant.

(Endorsements:) Received copy of the within motion this 3 day of Sept. 1909. John E. Carson, Attorney for People. Filed Sept. 3d, 1909, J. B. Soper, City Recorder. Filed Sept. 13, 1909, C. G. Keyes, Clerk, by J. H. Cowdery, Deputy.

16 In the Recorder's Court of South Pasadena, County of Los Angeles, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
against
J. L. MURPHY, Defendant.

Motion for New Trial.

The defendant in the above entitled action hereby moves the court to set aside the decision heretofore rendered herein, and grant defendant a new trial upon the following grounds, to-wit:

First. On the ground that there has been error in the decision of the Court given on questions of law arising during the course of the trial.

Second. On the ground that the decision is contrary to law, and contrary to evidence.

The motion for a new trial herein will be made and based upon the papers and records on file herein, and upon the testimony offered at said trial.

E. C. BOWERS &
H. C. MILLSAP,
Attorneys for Defendant.

(Endorsed:) Received copy of the within motion this 3d day of Sept. 1909. John E. Carson, Attorney for people. Filed Sept. 3, 1909, J. B. Soper, City Recorder. Filed Sep. 13, 1909, C. G. Keyes, Clerk, by J. H. Cowdery, Deputy.

17 In the Recorder's Court of South Pasadena, County of Los Angeles, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
against
J. L. MURPHY, Defendant.

Notice of Appeal.

Notice is hereby given, that the defendant in the above entitled action hereby appeals to the Superior Court in and for the County of Los Angeles, State of California;

First. From the judgment heretofore, to-wit on the 3rd day of September, 1909, rendered and entered against the above named defendant.

Second. From the order heretofore made and entered in said action denying defendant's motion for a new trial.

Which judgment and order were made and entered on the 3rd day of September, 1909.

You will also take notice that a statement of the case has been filed.

Dated: This 3rd day of September, 1909.

E. C. BOWERS &
H. C. MILLSAP,
Attorneys for Defendant.

(Endorsements:) Received copy of the within notice this 3d day of Sept. 1909. John E. Carson, Attorney for People. Filed Sept. 3d, 1908, J. B. Soper, City Recorder. Filed Sep. 13, 1909, C. G. Keyes, Clerk, by J. H. Cowdery, Deputy. Bond on Appeal. September 3, 1909. Bond on appeal filed as required by law at the time and as indicated in the transcript of Recorder's docket.

18 In the Recorder's Court of the City of South Pasadena, of the State of California, County of Los Angeles.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
v.
J. L. MURPHY, Defendant.

Action Misdemeanor, 'i. e.,' Violation of Ordinance No. 262 of So. Pasadena City.

J. E. Carson, Attorney for Plaintiff.
H. Millsap, Attorney for Defendant.

. . . . . .

Date. Proceedings.

. . . . . .

Complaint filed Jan. 23, 1908.

Defendant appeared in court and asked time to plead Hearing continued to Jan. 30, '08 and bail fixed at fifty dollars. Bail furnished.

1908.

Jan. 30. Defendant in court and filed Demurrer.

I. That said complaint does not substantially conform to the requirements of Secs. 950, 951 and 952 of the penal code of California.

II. That in said complaint more than one offence is charged except as provided in Sec. 954, of the penal code of California.

III. That the facts stated in said complaint do not constitute a public offense. Demurrer overruled. Defendant pled. not guilty. Def't demanded jury trial of 12 men.

Trial set for Feb. 6, 1908.

Feb. 6. Case continued to Feb. 20 and def't remanded to custody of City Marshal.

Feb. 20. Case continued to Feb. 27.

do. 27 Continued to Mar. 5.

Mar. 5. Case continued until appeal is heard in Superior Court.

July 30. Defendant brought into court by Marshal W. H. Johnston. Defendant deposited fifty ($50.00) Dollars cash bail to appear for trial Sept. 15, 1908, 9 A. M. Pursuant to certified copy of Order of the Supreme Court of the State of California this day filed, directing that J. L. Murphy be admitted to bail in the penal sum of one hundred dollars cash pending the final determination of the case entitled "In the Matter of J. L. Murphy for a Writ of Habeas Corpus, Criminal No. 1484, Supreme

Aug. 19. Court of the State of California," and conditioned
19 that J. L. Murphy deliver himself to the custody of the Marshal of South Pasadena within ten days after order of remand, if such order be made by the Supreme Court of the State of California;

Now therefore said J. L. Murphy having this day deposited the sum of one hundred dollars cash in compliance with said order; the same being done by depositing Fifty ($50) Dollars additional to the Fifty ($50) Dollars bail deposited with the court on July 30, 1908.

It is ordered that said J. L. Murphy be and is hereby admitted to bail pending the determination of the above entitled matter. Said Murphy to deliver himself to the custody of the City Marshal within ten days after order of remand by the Supreme Court of the State of California, if such order be made.

1908.

Sept. 15. It appearing that a writ of Habeas Corpus has been issued by the Supreme Court of the State of California for the production of said J. L. Murphy before said court and it appearing that said matter before said Supreme Court has not been determined the trial of this case is continued to Tuesday, Dec. 1st, 1908, at 9 o'clock a. m.

1909.

July 24. H. C. Millsap, Esq., attorney for defendant appeared before the court and asked to have the case set for trial. John E. Carson, Esq., attorney for plaintiff being present, the court set the case for trial on August 25th, 1909, at the hour of 9:30 o'clock a. m. At the same time attorney for defendant presented a bail bond in the sum of $200.00 signed by A. J. and R. J. Waters of the city of Los Angeles, State of California, for the appearance of defendant and requested the return of the $100.00 cash bail heretofore ordered by the Supreme Court of this state to be deposited with this court. Said bail bond is this day received and filed with this court as bail for defendant's appearance and submitting himself to the orders of this court, and said sum of $100.00 bail on deposit with this court is this day returned to defendant's attorney.

Aug. 25. At the request of Defendant's attorney case continued until Sept. 1st, 1909 at 9:30 o'clock a. m. Defendant also waived jury trial.

Sept. 1st. Defendant in court accompanied by his attorneys, E. C. Bower, Esq. and H. C. Millsap, Esq. J. E. Carson, Esq., attorney for plaintiff being present. W. L. Cox, city clerk and W. H. Johnston, city marshal, were sworn in behalf of the plaintiff. Motion by defendant's attorney, that defendant be discharged. Motion denied. J. L. Murphy sworn in behalf of defendant—case submitted—defendant found guilty as charged. Time of sentence fixed for Friday, September 3d, 1909, 9 o'clock a. m.

20

1909.

Sept. 3. Defendant in court with Counsel city attorney J. E. Carson being present. Motion in arrest filed and argued. Motion denied. Motion for new trial filed and argued. Motion denied. Defendant sentenced to pay a fine of $150.00 and in default of such fine or any portion thereof he shall be imprisoned in the county jail of Los Angeles County until the fine is satisfied in the proportion of one day imprisonment for every two dollars' fine said term of imprisonment not to exceed seventy-five days.

Notice of appeal filed by defendant.
Bond of defendant on appeal filed.
Statement on appeal settled allowed and filed.

I. J. B. Soper, City Recorder of the City of South Pasadena, do hereby certify that the within is a true and correct transcript of trial as shown by my docket lettered "Register of Actions—1. City of South Pasadena," wherein the People of the State of California appear as plaintiff vs. J. L. Murphy, defendant.

Said record appearing on Pages 170, 171 and 172 of said docket.

Witness my hand affixed at South Pasadena, California, this eleventh day of September, 1909.

J. B. SOPER.
City Recorder.

(Endorsed:) Filed Sep. 13, 1909. C. G. Keyes, Clerk. By J. H. Cowdery, Deputy.

21 *Ordinance No. 262.*

An Ordinance for Police Regulation, relating to Billiard Halls, Pool Rooms and Places Where Billiard, Pool, or Combination Billiard and Pool Tables are Kept for Hire or Public Use in the City of South Pasadena.

The Board of Trustees of the City of South Pasadena do ordain as follows:

SECTION 1. It shall be, and is hereby made unlawful for any person or persons, individually or by association with others, either as owner, principal, clerk, agent, servant or employee to establish, open, keep, carry on, or assist in carrying on, or maintain, or assist in maintaining any billiard hall, or pool room, or other place in the City of South Pasadena, where any billiard, pool, or combination billiard and pool table, or tables, is or are kept for hire or public use, and any person or persons, opening, keeping, carrying on, or assisting in carrying on, maintaining, or assisting in maintaining, any such place, herein specified, in said City of South Pasadena, shall be guilty of a misdemeanor, and every act in violation of this

section shall separately, or for each day of its continuance, be deemed a separate offense.

Provided, however, that nothing in this ordinance shall be construed or understood as prohibiting the owner, manager, or lessee of any hotel, universally recognized as a hotel, using a general register for guests, and having twenty-five bed-rooms and upwards, furnished as such, from keeping and maintaining any billiard, pool or combination billiard and pool table, or tables for the use of regular guests only of said hotel, in a room provided for that purpose in the building in which said hotel is located, and at no other place, on receiving a permit to do so, from the Board of Trustees of the City of South Pasadena. Applications for such permits shall be in writing, and filed with the Board of Trustees at least five days before the same is granted. If on investigation said Board finds the hotel for which such permit is desired, equipped and conducted as herein specified, it may, in its discretion, grant and issue such permit, without charge, and for such time as desired by the applicant, but in no event to extend beyond the date of the next succeeding municipal election; provided, if said Board of Trustees shall at any time become satisfied that any person to whom any such permit is granted, his clerk, agent or employee has permitted any person other than a regular guest of said hotel, or any person who has not in good faith become a regular guest of said hotel, or is guilty of a violation of any provision of this ordinance, they shall cancel, revoke and withdraw such permit and all rights thereunder, and no other permit shall thereafter be granted to said person.

SECTION 2. Any clerk, servant, agent, employee, or person committing any act in violation of any of the provisions of this Ordinance shall be deemed guilty as principal.

SECTION 3. Every person taking out or having taken out a license for any business for which a license is required by the City of South Pasadena, who shall be convicted of establishing, keeping, or maintaining a place where any billiard, pool or combination billiard and pool table, or tables is or are kept contrary to the provisions of this ordinance, shall, in cases where such unlawful place has been established, kept or maintained, or said unlawful act has been done in connection with said lawful business, forfeit such license and no new license for such lawful business shall be issued to said person during a period of one year thereafter.

SECTION 4. Every person found guilty of a violation of any of the provisions of this ordinance shall be fined in the sum of not less than twenty-five dollars, nor more than three hundred dollars, or shall be imprisoned in the city jail of the City of South Pasadena, or in the county jail of the County of Los Angeles, for not more than three months, or by both such fine and imprisonment, and every judgment or fine for violation of any of the provisions of this ordinance shall direct that in default of payment of such fine, or any part thereof, the person shall be imprisoned in the city jail of the City of South Pasadena, or in the County Jail of the County of Los Angeles, until the fine is satisfied, in the proportion of one

day's imprisonment for every two dollars of such fine remaining unpaid.

SECTION 5. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

SECTION 6. The City Clerk shall attest this ordinance and cause the same to be published once in the South Pasadenan, a newspaper published and circulated in said City of South Pasadena, and thereupon and thereafter this ordinance shall be in full force and effect.

Passed and approved by the Board of Trustees of the City of South Pasadena this 13th day of January, 1908, by the following vote:

Ayes—Axtman, Hargrave, Perkins, Pridham and Taylor.
Noes—None.

R. W. PRIDHAM,
President of the Board of Trustees of the City of South Pasadena.

Attest:

ALEXIS HINCKLEY,
Clerk of the City of South Pasadena.

23 I hereby certify that the foregoing is a true and correct copy of Ordinance No. 262 entitled, "An Ordinance for Police Regulation, Relating to Billiard Halls, Pool Rooms, and Places Where Billiard, Pool, or Combination Billiard and Pool Tables Are Kept for Hire or Public Use in the City of South Pasadena," as same appears on the files and records in the office of the City Clerk of said City of South Pasadena; and I further hereby certify that said Ordinance was duly published in the South Pasadenan, a weekly newspaper published and circulated in said City of South Pasadena, on the 16th day of January, 1908.

In witness whereof I have hereunto set my hand and the seal of the City of South Pasadena this 3rd day of September, 1909.

[Seal of the City of South Pasadena.]

WM. L. COX,
City Clerk of the City of South Pasadena.

(Endorsed:) Certified copy of Ordinance No. 262. Filed Sept. 13, 1909. C. G. Keyes, Clerk. By J. H. Cowdery, Deputy.

24 TUESDAY, *November 9th*, 1909.

In Open Court.

Present:

Hon. Frank R. Willis, Judge.
The Sheriff, Reporter and Clerk.

No. 6046.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
J. L. MURPHY, Defendant.

This cause having been submitted and taken under advisement, it is now ordered that the Judgment and Order of the Recorder's Court of South Pasadena in the above entitled cause be and the same hereby are affirmed.

(Volume 1, page 201, Minutes and Orders of the Superior Court of the County of Los Angeles, State of California, Department No. 11 thereof.)

25 UNITED STATES OF AMERICA:

In the Superior Court of the State of California in and for the County of Los Angeles.

J. L. MURPHY, Defendant, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Defendant in Error.

Petition for Writ of Error.

To the Honorable Curtis D. Wilbur, Presiding Judge of the Superior Court of the State of California, in and for the County of Los Angeles:

The petition of J. L. Murphy, the above named plaintiff in error respectfully shows:

That the City of South Pasadena is, and at all times hereinafter mentioned was, a municipal corporation in the County of Los Angeles, State of California.

That your petitioner is, and at all times hereinafter mentioned was, a citizen of the United States, over the age of twenty-one years, and was on the 18th day of January, 1908, and for some time prior thereto had been a resident of the City of South Pasadena, County of Los Angeles, State of California.

That for several years preceding 1908 he had been engaged in the business of conducting public pool and billiard halls, and by said business provided a livelihood for himself and family.

That on the 1st day of January, 1908, he leased the premises,
911 Center Street in the city of South Pasadena, and fitted
26 up the place for the purpose of carrying on a public pool
and billiard hall in said City of South Pasadena. That he expended about Three Thousand Dollars fitting up said business and buying pool and billiard tables and the necessary equipment and in furnishing said room and in preparing to conduct said business and establishing the same. That at the time he procured a lease on said premises and purchased said property necessary to equip said room for the conduct of said business there was no ordinance or law in said City of South Pasadena prohibiting the conduct of said business.

That said City of South Pasadena is a City of about five thousand inhabitants, and that there exists within its corporate limits the Raymond Hotel and the Capitola Hotel, and that there is no other hotel in said City universally recognized as a hotel using a general register for guests or having twenty-five bed rooms and upwards furnished as such.

That on the 14th day of January, 1908, an Ordinance was duly passed by the Trustees of said City of South Pasadena, the same being Ordinance No. 262; Section 1 thereof being as follows, to-wit:

SECTION 1. It shall be, and is hereby made unlawful for any person or persons, individually or by association with others, either as owners, principal, clerk, agent, servant or employee to establish, open, keep, carry on, or assist in carrying on, or maintain, or assist in maintaining any billiard hall, or pool room, or other place in the City of South Pasadena, where any billiard, pool or combination, billiard and pool table, or tables, is or are kept for hire or public use, and any person or persons, opening, keeping, carrying on, or assisting in carrying on, maintaining, or assisting in maintaining, any such place, herein specified, in said City of South Pasadena, shall be guilty of a misdemeanor, and every act in violation of this Section shall be separately, or for each day of its continuance, be deemed a separate offense.

Provided, however, that nothing in this ordinance shall be construed or understood as prohibiting the owner, manager or lessee of
any hotel, universally recognized as a hotel, using a general
27 register for guests, and having twenty-five bed-rooms and
upwards, furnished as such, from keeping and maintaining any billiard, pool or combination billiard and pool table, or tables for the use of regular guests only of said hotel, in a room provided for that purpose in the building in which said hotel is located, and at no other place, on receiving a permit so to do, from the Board of Trustees of the City of South Pasadena. Application for such permits shall be in writing, and filed with the Board of Trustees at least five days before the same is granted. If on investigation said Board finds the hotel for which such permit is desired, equipped and conducted as herein specified, it may, in its discretion, grant and issue such permit, without charge, and for such time as desired by the applicant but in no event to extend beyond the date of the next succeeding municipal election; provided, if said Board of Trustees

shall at any time become satisfied that any person to whom any such permit is granted, his clerk, agent, or employee has permitted any person other than a regular guest of said hotel, or any person who has not in good faith become a regular guest of said hotel or is guilty of a violation of any provision of this ordinance, they shall cancel, revoke, and withdraw such permit and all rights thereunder, and no other permit shall thereafter be granted to said person.

Section IV thereof being as follows, to-wit:

SECTION 4. Every person found guilty of a violation of any of the provisions of this Ordinance shall be fined in the sum of not less than twenty-five dollars, nor more than three hundred dollars, or shall be imprisoned in the City Jail of the City of South Pasadena, or in the County Jail of the County of Los Angeles, for not more than three months, or by both such fine and imprisonment, and every judgment of fine for violation of any of the provisions of this Ordinance shall direct that in default of payment of such fine, or any part thereof, the person shall be imprisoned in the City Jail of the City of South Pasadena, or in the County Jail of the County of Los Angeles, until the fine is satisfied, in the proportion of one day's imprisonment for every two dollars of such fine remaining unpaid.

Petitioner further shows that on the 18th day of January, 1908 a complaint was made to O. W. Orcutt the Recorder of said City of South Pasadena, charging that on the 17th day of January, 1908 at the City of South Pasadena, County of Los Angeles, State of California, the crime of violating the said Ordinance No.
28 262 of said City of South Pasadena was commited by said J. L. Murphy, your petitioner, and charged that your petitioner at the time and place aforesaid did willfully and unlawfully engage in, establish, open, keep, carry on, and assist in carrying on, maintain, and assist in maintaining a billiard hall and pool room and place by them and there keeping billiard pool and combination billiard and pool tables for hire and for public use. That said complaint was duly and regularly made to said Recorder, and thereupon, on the 18th day of January, 1908, the said Recorder issued a warrant, authorizing and directing the arrest of the said J. L. Murphy, your petitioner, for the offense charged in said complaint; and thereupon on said day, in pursuance of said warrant, the said Marshal/ of the City of South Pasadena did arrest your petitioner.

That your petitioner was thereupon arraigned and pleaded not guilty. and was then admitted to bail, and thereafter on the 1st day of September, 1909 was duly tried on said charge before the Honorable J. B. Soper, Recorder of said City of South Pasadena, and during said trial the following proceedings were had.

That W. L. Cox, a witness was sworn on behalf of the People, and the aforesaid witness testified.

Said defendant J. L. Murphy objected to the introduction of any testimony in the case on the ground that the facts stated in the complaint are not sufficient and do not constitute a public offense, and that said Ordinance No. 262 of the City of South Pasadena, which the said defendant is charged with violating, is unconsti-

tutional and void in that it is repugnant to the Constitution of the United States.

That said Recorder overruled the defendant's objection, and the defendant duly excepted thereto.

29 That during the testimnoy of said witness said Ordinance No. 262 aforesaid was offered in evidence, and the defendant objected to the same on the ground that said Ordinance is void because the same is repugnant to the Constitution of the United States; and said Recorder overruled the defendant's objection, and the defendant duly excepted thereto; and said Ordinance was introduced in evidence on the trial of said case.

When the plaintiff had closed its evidence, the defendant moved the court to strike out all of the evidence on the ground that said Ordinance is invalid as it is in violation of the provisions of the Constitution of the United States, and the Court denied the motion, and the defendant duly excepted.

The defendant then testified among other things that since the adoption of said Ordinance it has been impossible for him to dispose of his lease or the equipment of said pool and billiard hall without great loss, and by reason of said Ordinance the investment made by him is rendered valueless, and that since his arrest he has been deprived of the use of said property.

The evidence being closed, the defendant, by his attorneys, then moved said Court to discharge said defendant on the ground that the complaint does not charge or state facts sufficient to constitute a public offense for the reason that said Ordinance No. 262 is void in that it is repugnant to the provisions of Section I, Article 14 of the Amendments to the Constitution of the United States.

The Court denied the motion, to which ruling the defendant excepted.

Your petitioner further shows that he, the said defendant did at said trial and in said suit brought by the People of the State of California against him for conducting said pool and billiard

30 hall in the City of South Pasadena, claim and contend that said Ordinance No. 262 prohibiting him from carrying on said business was void, because in violation of the provisions of the Constitution of the United States which provides that:

"No State shall make or enforce any law which shall abridge the privileges and immunities of a citizen of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

And the validity of said Ordinance was drawn in question on the ground of it being repugnant to the Provisions of the Constitution of the United States aforesaid, and the plaintiff in said suit (defendant in error herein) did claim and contend that said Ordinance is valid and is not repugnant to the Provisions of the Constitution of the United States, and the decision of said Court was in favor of the validity of said Ordinance, and said Court thereupon decided and found your petitioner J. L. Murphy guilty as charged.

And your petitioner further shows that thereafter on the 3rd day

of September, 1909 he was brought in said Court for sentence, and before judgment was pronounced upon him, he moved said Court in arrest of judgment on the ground that the complaint filed in said action does not state facts sufficient to constitute a public offense for the reason that said Ordinance No. 262 is void, because it is repugnant to Section I, Article 14 of Amendments to the Constitution of the United States, and said Court denied said motion, and the defendant duly excepted. Also before said judgment was pronounced your petitioner moved said Court for a new trial, and said Court denied defendant's motion, to which the defendant duly excepted.

Judgment was then pronounced upon said defendant imposin' upon him a fine of One Hundred Fifty Dollars, and that in
31 default of a payment thereof he be imprisoned in the County Jail of Los Angeles County until said fine be satisfied at the rate of one day's imprisonment for each dollar of said fine; said term of imprisonment not to exceed one hundred fifty days.

Your petitioner further shows that he then gave notice of appeal in said action, and thereupon appealed from said judgment to the Superior Court of the State of California, in and for the County of Los Angeles, and perfected said appeal, and said suit was thereby brought up to said Superior Court for hearing upon a statement on appeal which appears of record in said suit, and upon which said cause was tried, heard and determined in said Superior Court, and said hearing in said Superior Court on said appeal was had on the 9th day of November 1909, and therein your petitioner did claim and contend that the said Ordinance No. 262 of the City of South Pasadena is void because in violation of said provisions of Section I, Article 14 of the Amendments of the Constitution of the United States, and there was drawn in question the validity of said Ordinance on the ground of its being repugnant to the Constitution of the United States, and the plaintiff in said action, (the defendant in error herein) did claim and contend that the said Ordinance is valid and is not repugnant to the Provisions of the Constitution of the United States, and the decision of said Superior Court was in favor of the validity of said Ordinance, and the decision and judgment of said Recorder's Court of South Pasadena was affirmed by said Superior Court.

Your petitioner further shows that there is no provision of law in the State of California for a rehearing on said appeal, and on the 9th day of November, 1909, the remit-itur from said Superior
32 Court affirming said decision and judgment of said Recorder's Court of South Pasadena was filed therein, and said judgment of the said Superior Court affirming said decision and judgment of said Recorder's court became final.

That said Superior Court is the highest Court in this State having jurisdiction of said action, and it is impossible for the defendant therein (the plaintiff in error herein) to review the decision in said case by appealing to the Supreme Court of the State of California or by further motion or proceedings except by Writ of Error to the Supreme Court of the United States, and that said judgment of the

Superior Court affirming judgment of said Recorder's Court is the final judgment in the highest Court in the State of California in which a decision in said suit could be had.

And your petitioner alleges that the said Ordinance is void because it is in violation of and repugnant to the provisions of the Constitution of the United States aforesaid, and that said Superior Court of the State of California, in and for the County of Los Angeles did err in deciding in favor of the validity of the said Ordinance and in affirming the judgment of said Recorder's Court as will appear by the assignment of errors presented herewith.

Wherefore your petitioner prays that the Writ of Error presented herewith from the Supreme Court of the United States to the Superior Court of the State of California, in and for the County of Los Angeles be allowed, and such other process as will enable your petitioner to obtain a review of the said cause of the People of the State of California against J. L. Murphy, and the correction of the error aforesaid committed by said Superior Court, and for
33 such further orders as may be proper and your petitioner will further pray.

H. A. PIERCE,
Attorneys for J. L. Murphy, Petitioner.

E. C. BOWER,
H. C. MILLSAP,
Of Counsel.

"O. K.,
WILLIS, *J.*"

(Endorsed:) No. 6046. Dept. 11. Title of Court & Cause. Petition for Writ of Error. Filed Dec. 3, 1909. C. G. Keyes, Clerk, by J. H. Cowdery, Deputy.

34 UNITED STATES OF AMERICA:

In the Superior Court of the State of California in and for the County of Los Angeles.

J. L. MURPHY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Assignment of Errors.

J. L. Murphy having petitioned the Honorable Curtis D. Wilbur, the presiding Judge of the Superior Court of the State of California, in and for the County of Los Angeles, for an order allowing a Writ of error herein, and permitting said J. L. Murphy to prosecute a Writ of Error to the Honorable Supreme Court of the United States from the final judgment made and entered in said cause by said Superior Court, now makes, presents and files the following

assignment of errors herein, upon which he will rely for the reversal of said Judgment upon said Writ.

I.

That said Superior Court of the State of California, in and for the County of Los Angeles erred in deciding that the defendant J. L. Murphy was guilty of a public offense for the reason that the Ordinance No. 262 of the City of South Pasadena, under which said defendant was prosecuted, is void, because of it being repugnant to the Constitution of the United States.

35 II.

That said Superior Court erred in affirming the Judgment of the Recorder's Court of South Pasadena, which was a Judgment convicting said defendant for violating said Ordinance No. 262, for the reason that said Ordinance is void, because of it being repugnant to the Constitution of the United States.

III.

That said Superior Court erred in not reversing the Judgment of the Recorder's Court of the City of South Pasadena, for the reason that said Ordinance No. 262 of the City of South Pasadena is void, because of it being repugnant to the constitution of the United States.

IV.

That said Superior Court erred in holding and deciding that said Ordinance No. 262 of the City of South Pasadena is valid, and that said complaint, on which said defendant was convicted, stated facts sufficient to constitute a public offence, and charged said defendant with the commission of a public offense.

V.

That said Superior Court erred in holding and deciding that said Ordinance No. 262 did not abridge the privileges and immunities of the defendant, a citizen of the United States, and that said Ordinance did not deprive said defendant of his liberty and property without due process of law, and that said Ordinance did not deny to said defendant the equal protection of the laws, and that said Ordinance is reasonable.

VI.

That said Superior Court erred in holding and deciding that the determination by the legislative body of the City of South
36 Pasadena is conclusive upon the Courts as to the necessity, propriety, reasonableness, and scope of the said Ordinance in the exercise of the police powers of said City.

VII.

That said Superior Court erred in holding and deciding that said Ordinance is valid, and did not abridge the privileges and immunities of said defendant, a citizen of the United States.

VIII.

That said Superior Court erred in holding and deciding that said Ordinance is valid, and did not deprive said defendant of his liberty and property without due process of law.

IX.

That said Superior Court erred in holding and deciding that said Ordinance is valid, and did not deny to said defendant equal protection of the laws.

X.

That said Superior Court erred in holding and deciding that the City of South Pasadena in the exercise of its police power may prohibit the carrying on of a lawful business, and that the determination by the legislative body of said City is conclusive.

XI.

That said Superior Court erred in not reversing the Judgment of said Recorder's Court of the City of South Pasadena upon its ruling in which it struck out portions of the testimony of the defendant, and refused to allow the defendant to prove the situation and manner in which the said business was conducted, the said testimony so stricken out being as follows, to-wit:

37 "The said pool and billiard hall was equipped with new tables and new furnishings and was in every respect neat and sightly. That the place where said business was established, to-wit; 911 Center Street was at all times kept in a perfect sanitary condition, and at no time had there been anything about said premises, or the manner of conducting said business which in the least could or would be offensive to the senses. That said business was patronized only by the business men and the best people of South Pasadena as a source by them of recreation and amusement. That there was at no time any loitering or lounging around on said premises, nor were there any persons of bad character permitted on said premises or allowed to play at said games. No gambling or betting of any kind was allowed in said place of business, nor were any unlawful acts of any kind done, allowed or permitted on said premises, but said business was conducted on strictly lawful and moral lines, and there was nothing in the conduct of said business or the manner in which it was carried on, or the conduct of those who frequented said place of business or played at said games, which had any tendency to immorality or in the least could in any way effect the health, comfort, safety or morality of the community, or of those who frequented said place of business. That said premises are located in the business

part of South Pasadena, and surrounded only by business buildings and vacant lots, and there is no residence within seven hundred feet of said premises. That said place of business was carried on and conducted in a quiet and peaceable manner, and without any boisterous or unusual noise of any kind, and the conduct of all persons who visited said place is and was quiet and peaceable. That no noise of any kind whatever is made in the operation of said business which could be heard outside of the room in which said business is conducted.

By the record aforesaid it appears that the Judgment of said Superior Court was given for the defendant in error against the plaintiff in error, and did affirm the Judgment of the Recorder's Court of the City of South Pasadena and the various rulings and decisions made therein, and whereas by the law of the land said Judgment of said Superior Court ought have reversed the Judgment of said Recorder's Court, and the said decision ought to have been against the validity of the said Ordinance No. 262 of the
38 City of South Pasadena, and that said Ordinance was repugnant to the Constitution of the United States and void; and the said plaintiff in error prays that the judgment and decision of said Superior Court be reversed and that said Superior Court of the State of California, in and for the County of Los Angeles, be ordered and directed to reverse the decision and judgment of the said Recorder's Court of the City of South Pasadena, State of California; and that the plaintiff in error may have such other relief as he is entitled to.

H. A. PIERCE,
Attorneys for J. L. Murphy,
Plaintiff in Error.

E. C. BOWER,
H. C. MILLSAP,
Of Counsel.

(Endorsed:) No. 6046. Dept. 11. Title of Court & Cause Assignment of errors. Filed Dec. 3, 1909. C. G. Keyes, Clerk. By J. H. Cowdery, Deputy.

39 UNITED STATES OF AMERICA:

In the Superior Court of the State of California in and for the County of Los Angeles.

J. L. MURPHY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Order Allowing Writ of Error.

Upon presenting and filing the petition of J. L. Murphy, defendant, and plaintiff in error, for a Writ of Error, together with Assign-

ment of Errors, Citation, and Bond on Writ of Error, which is approved; and it appearing that in said suit there has been drawn in question the validity of an Ordinance of the City of South Pasadena on the ground of it being repugnant to the Constitution of the United States and the decision therein is in favor of the validity of said Ordinance, and the Judgment of said Superior Court therein is the final Judgment of the highest Court in this State in which a decision in said suit could be had;

It is ordered that the Writ of Error be, and hereby is, allowed, to have reviewed in the Supreme Court of the United States the Judgment heretofore entered in said Superior Court
40 in said action of the People of the State of California vs. J. L. Murphy.

And it is further ordered that the Writ of Error herein allowed shall operate as a supersedeas in said action.

CURTIS D. WILBUR,
Presiding Judge of the Superior Court of the State of California in and for the County of Los Angeles.

Dated this 3 day of December, 1909.

(Endorsed:) No. 6046. Dept. 11. Title of Court & Cause. Order allowing writ of error. Filed Dec. 3, 1909. C. G. Keyes, Clerk. By J. H. Cowdery, Deputy.

41 UNITED STATES OF AMERICA:

In the Superior Court of the State of California in and for the County of Los Angeles.

J. L. MURPHY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Order Fixing Bond on Writ of Error.

J. L. Murphy, defendant and plaintiff in error having filed his petition for a Writ of Error to have reviewed in the Supreme Court of the United States the decision and judgment of said Superior Court made and entered in said action of The People of the State of California vs. J. L. Murphy, together with Assignment of Errors, within due time, and having prayed that an order be made fixing the amount of bond required as security to be given on said Writ of Error, and said Writ of Error having this day been allowed:

It is therefore ordered that the amount of the bond to be given on the part of said J. L. Murphy on said Writ of Error is fixed at the sum of $500, and that a bond be executed on behalf of said plaintiff in error, to the State of California by two or more good and sufficient sureties in the sum of $500 and filed with the Clerk of

said Court, conditioned that if said J. L. Murphy, plaintiff in
42 error, shall prosecute the said Writ of Error to effect and answer all damages and costs if he fails to make his plea good, then the obligation shall be void, otherwise to remain in full force and effect; said bond to be approved by this Court.

Dated 3 Day of December, 1909.

CURTIS D. WILBUR,
Presiding Judge of the Superior Court of the State of California in and for the County of Los Angeles.

(Endorsed:) No. 6046. Dept. 11. Title of Court & Cause. Order Fixing Bond on Writ of Error. Filed Dec. 3, 1909. C. G. Keyes, Clerk. By J. H. Cowdery, Deputy.

43 UNITED STATES OF AMERICA:

In the Superior Court of the State of California in and for the County of Los Angeles.

J. L. MURPHY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Bond on Writ of Error.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Whereas lately in said Superior Court of the State of California, in and for the County of Los Angeles, in a suit pending in said Court, in which The People of the State of California, were plaintiff, and the said J. L. Murphy was defendant, a final Judgment was rendered against said defendant J. L. Murphy affirming the Judgment of the Recorder's Court of the City of South Pasadena, and the said J. L. Murphy having obtained from said Superior Court the allowance of a Writ of Error to review said judgment of said Superior Court aforesaid, and the citation directed to The People of the State of California, plaintiff, and defendant in error is about to be issued, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington, in
44 the District of Columbia, and said Superior Court having made an Order requiring a bond to be executed and filed with the Clerk of said Court on behalf of said J. L. Murphy, plaintiff in error in the sum of $500.00 as security on said Writ of Error.

Now therefore, in consideration of the premises, and of said Writ of Error, and the Order of said Superior Court, we, A. J. Waters and R. J. Waters of Los Angeles, California, are jointly and severally held and firmly bound unto the State of California in the sum of $500.00 to be paid to said State of California, or its assigns, for which

payment well and truly to be made we bind ourselves, our heirs, executors and administrators firmly by these presents.

The condition of the above obligation is such that if the said J. L. Murphy, plaintiff in error, shall prosecute his Writ of Error to effect, and shall answer all damages and costs that may be awarded against him if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect.

In witness whereof the said A. J. Waters and R. J. Waters have hereunto set their hands and seals this 3d day of December, 1909.

A. J. WATERS.
R. J. WATERS.

45 STATE OF CALIFORNIA,
County of Los Angeles, ss:

A. J. Waters and R. J. Waters, the persons named in, and who subscribed the foregoing bond as sureties thereto, being severally duly sworn, each for himself, says:

That he is worth the amount specified in said bond as the penalty thereof, to-wit, the sum of $500.00 over and above all his just debts and liabilities exclusive of property exempt from execution; and that he is a resident and freeholder of the County of Los Angeles, State of California.

A. J. WATERS.
R. J. WATERS.

Subscribed and sworn to before me this 3 day of December, 1909.

H. C. MILLSAP, [SEAL.]
Notary Public in and for the County of Los Angeles, State of California.

The foregoing bond is hereby approved this 3d day of December, 1909.

CURTIS D. WILBUR,
Presiding Judge of the Superior Court of the State of California in and for the County of Los Angeles.

(Endorsed:) No. 6046. Dep't 11. Title of Court & Cause. Bond on Writ of Error. Filed Dec. 3 1909, C. G. Keyes, Clerk, by J. H. Cowdery, Deputy.

46 UNITED STATES OF AMERICA:

In the Superior Court of the State of California in and for the County of Los Angeles.

J. L. MURPHY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Certificate.

It is hereby certified that this cause was duly appealed by J. L. Murphy, plaintiff in error to the Superior Court of the State of California, in and for the County of Los Angeles, from the judgment made and entered in the Recorder's Court of the City of South Pasadena, and was heard and decided by said Superior Court on the 9th day of November, 1909 upon the record sent up from said Recorder's Court; and the decision and judgment of said Superior Court affirmed the judgment of said Recorder's Court; and on the hearing of said appeal in said Superior Court there was drawn in question the validity of said Ordinance No. 262 of the City of South Pasadena on the ground of it being repugnant to the Constitution of the United States; and the decision of said Superior Court was in favor of the validity of said ordinance. And said Superior Court in making and rendering its said decision and judgment affirming the judgment of said Recorder's Court held and decided that said
47 Ordinance is valid, and is not void because of being repugnant to the Constitution of the United States; and that said Superior Court could not have held said Ordinance void without reversing the judgment of said Recorder's Court; and the decision and judgment of said Superior Court is erroneous if said Ordinance is repugnant to the provisions of the Constitution of the United States, and there is no provision of law in the State of California for appeal to any higher court from said decision and judgment of said Superior Court, and said Superior Court is the highest court in this State having jurisdiction of said action, and said decision and judgment of said Superior Court in said cause cannot, under the laws of California, be reviewed by any higher court in this state, nor can it be reviewed by any further motions or proceedings in said Superior Court, or in any Court except in the Supreme Court of the United States upon a Writ of Error. And that said judgment of said Superior Court affirming the judgment of said Recorder's Court became final upon the rendition thereof, and is the final judgment of the highest court in this State in which a decision in said suit could be had.

It is further certified that the Superior Court of the State of California, in and for the County of Los Angeles, consists of twelve judges. That by the rules of said Superior Court the same is divided into twelve departments, and one Judge is assigned to each department; and the rules of said Superior Court also provide that one

Judge, selected, shall serve as the Presiding Judge of said Court for the ensuing year, commencing the 1st day of May, each year; and that on the 1st day of May, 1909, I was selected to serve as Presiding Judge, and am now and will continue to be the Presiding
48 Judge of said Court until the 1st day of May, 1910.

Wherefore this certificate is ordered to be made a part of the record in said cause, and to be attested with the Seal of said Court.

Dated this 3 day of December, 1909.

CURTIS D. WILBUR,
Presiding Judge of the Superior Court of the State of California in and for the County of Los Angeles.

Attest: This 3 day of December, 1909.

[Superior Court Seal.]

C. G. KEYES,
Clerk of the Superior Court of the State of California in and for Los Angeles County.
By D. S. BURSON, JR., *Deputy.*

"O. K.
WILLIS, *J.*"

(Endorsed:) No. 6046. Dep't 11. Title of Court & Cause. Certificate. Filed Dec. 3 1909. C. G. Keyes, Clerk, by J. H. Cowdery, Deputy.

49 UNITED STATES OF AMERICA:

In the Superior Court of the State of California in and for the County of Los Angeles.

J. L. MURPHY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Citation.

To the People of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, on the 27 day of January, 1910, pursuant to a Writ of Error filed in the Clerk's office of the Superior Court of the State of California, in and for the County of Los Angeles, wherein J. L. Murphy is plaintiff in error, and you, The People of the State of California, are defendant in error, to show cause, if any there be, why the Judgment rendered against said plaintiff in error, as in said Writ of Error mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Curtis D. Wilbur, Presiding Judge of the Superior Court of the State of California, in and for the County of Los Angeles, this 3 day of December, in the year of our Lord one thousand nine hundred and nine.

[Seal Superior Court, Los Angeles County, California.]

CURTIS D. WILBUR,
Presiding Judge of the Superior Court of the State of California in and for the County of Los Angeles.

Due service of the within and foregoing citation, and receipt of a copy of the Writ of Error mentioned therein is this day admitted, and a copy of the same served upon me at Los Angeles, California, this 3rd day of December, 1909.

JOHN E. CARSON,
Attorney for the People of the State of California, Defendant in Error.

50 [Endorsed:] Original. No. 6046. Dept. 11. In the Superior Court of the State of California, in and for the County of Los Angeles. J. L. Murphy, Defendant, and Plaintiff in Error, vs. The People of the State of California, Plaintiff, and Defendant in Error. Citation. Filed Dec. 3, 1909. C. G. Keyes, Clerk. By J. H. Cowdery, Deputy. H. C. Millsap, Suite 836 Herman W. Hellman Bldg., 354 South Spring St., Los Angeles, Cal. Telephone Home A 7712. Attorney for plaintiff in error. Removed to Suite 401 Currier Bldg.

51 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Superior Court of the State of California in and for the County of Los Angeles, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said Superior Court of the State of California, in and for the County of Los Angeles, before you, or some of you, being the highest court of law or equity of the State of California in which a decision could be had in that certain suit between the People of the State of California, plaintiff, and defendant in error herein, and J. L. Murphy, defendant, and plaintiff in error herein, wherein was drawn in question the validity of an Ordinance of the City of South Pasadena on the ground of it being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said Ordinance; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, privilege, immunity, and exemption specially set up and claimed

under such clause of the Constitution of the United States by said J. L. Murphy and manifest error hath happened to the great damage of the said J. L. Murphy, the plaintiff in error, as by his complaint appears;

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send
52 the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the 27th day of January, 1910, A. D., in said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 3d day of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal U. S. Circuit Court, Southern Dist. Cal., 1886.]

WM. M. VAN DYKE,
Clerk of the United States Circuit Court of the Southern District of Californiaa.

Allowed by

CURTIS D. WILBUR,
Presiding Judge of the Superior Court of the State of California in and for the County of Los Angeles.

I hereby certify that a copy of the foregoing Writ of Error was, on the 3rd day of December, 1909, lodged in the Clerk's office of the Superior Court of the State of California, in and for the County of Los Angeles, for the said plaintiff in error.

Witness my hand and the seal of my office.

[Seal Superior Court, Los Angeles County, California.]

C. G. KEYES,
Clerk of the Superior Court of the State of California in and for Los Angeles County.
By D. S. BURSON, Jr., *Dep.*

53 [Endorsed:] Original. No. 6046. Dep. 11. Supreme Court of the United States. J. L. Murphy, Plaintiff in Error, vs. The People of the State of California, Defendant in Error. Writ of Error. Filed Dec. 3, 1909. C. G. Keyes, Clerk. By J. H. Cowdery, Deputy. H. C. Millsap, Attorney at Law, 400-1-2 Currier Building, 212 West 3d St. Tel. Home A 7712. Los Angeles, Cal.

54 In the Superior Court of the State of California in and for the County of Los Angeles.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
J. L. MURPHY, Defendant.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, C. G. Keyes, County Clerk in and for the County of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of the State of California, in and for said County of Los Angeles, do hereby certify that I have compared the foregoing copies of the Statement on Appeal; Certificate of Recorder; Motion in Arrest of Judgment; Motion for New Trial; Notice of Appeal; Transcript of Recorder's Docket; Ordinance No. 262; Judgment of the Superior Court; Petition for Writ of Error; Assignment of Errors; Order allowing Writ of Error; Order fixing Bond on Writ of Error; Bond on Writ of Error; and Certificate of Presiding Judge, with the original papers in the above entitled cause, and said copies contain a full, true and correct copy of said original papers.

I further certify that said copies, together with the origi-
55 nal Writ of Error and the original Citation, which said original Writ of Error and Citation are hereunto attached, constitute all the papers and entire record in said cause to be reviewed in the Supreme Court of the United States on Writ of Error to the said Superior Court of Los Angeles County, State of California.

In witness whereof, I have hereunto set my hand and the seal of the said Superior Court, this 17th day of January, A. D. 1910.

[Seal Superior Court, Los Angeles County, California.]

C. G. KEYES,
County Clerk and ex-Officio Clerk of the Superior Court of the State of California in and for the County of Los Angeles.
By W. T. McNEELY,
Deputy Clerk.

56 [Endorsed:] Transcript of Record. Supreme Court of the United States. J. L. Murphy, Plaintiff in Error, vs. The People of the State of California, Defendant in Error. In Error to the Superior Court of Los Angeles County, State of California. H. A. Pierce, Attorney for Plaintiff in Error. Of Counsel, E. C. Bower, H. C. Millsap.

Endorsed on cover: File No. 22,013. California, Los Angeles County, Superior Court. Term No. 204. J. L. Murphy, plaintiff in error, vs. The People of the State of California. Filed February 8th, 1910. File No. 22,013.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1910.

No. 434

J. L. Murphy,	*Plaintiff in Error,*
	vs.
The People of the State of California,	*Defendant in Error.*

MOTION TO ADVANCE CAUSE.

In error to the Superior Court of Los Angeles county, state of California.

Now comes The People of the state of California, defendant in error, and moves the court to advance for argument, the above entitled cause, in accordance with paragraph 3, rule 26, of this

court, on the ground that the same is a criminal case, to-wit: a writ of error from a judgment of the Superior Court of Los Angeles county, state of California, affirming a judgment of the Recorder's court of the city of South Pasadena convicting the plaintiff in error of the violation of an ordinance of said city of South Pasadena.

LYNN HELM,
JOHN E. CARSON,
Attorneys for Defendant in Error.

Counsel for defendant in error ask that the hearing of said case be advanced to as near the beginning of the October Term, 1911, as will meet the convenience of the court, the hearing to be in the month of October, A. D. 1911, if possible.

LYNN HELM,
JOHN E. CARSON,
Attorneys for Defendant in Error.

To H. C. Millsap, Esq., and H. A. Pierce, Esq., Attorneys for Plaintiff in Error:

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1910.

No. 434

J. L. Murphy,
Plaintiff in Error,
vs.
The People of the State of California,
Defendant in Error.

NOTICE OF MOTION TO ADVANCE CAUSE.

You, and each of you, will please take notice that on Monday, the 15th day of May, A. D. 1911, at the opening of court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a true copy, will be submitted to said court for its decision thereon.

Dated this 12th day of April, A. D. 1911.

LYNN HELM,
JOHN E. CARSON,
Attorneys for Defendant in Error.

Service of the above notice of motion, with true copy thereof, is hereby acknowledged this 12 day of April, A. D. 1911.

H. A. PIERCE,
H. C. MILLSAP,
Attorneys for Plaintiff in Error.

29

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 204

J. L. MURPHY, *Plaintiff in Error,* vs. THE PEOPLE OF THE STATE OF ILLINOIS, *Defendant in Error.*	Writ of Error to the Supreme Court of California.

SUGGESTIONS OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO ADVANCE THIS CAUSE.

LEVY MAYER and
ALFRED S. AUSTRIAN,
Attorneys for Plaintiff in Error.

GUNTHORP - WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 204

J. L. MURPHY, *Plaintiff in Error,* *vs.* **THE PEOPLE OF THE STATE OF ILLINOIS,** *Defendant in Error.*	Writ of Error to the Supreme Court of California.

SUGGESTIONS OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO ADVANCE THIS CAUSE.

To the Honorable Judges of the Supreme Court of the United States:

The motion to which these suggestions are directed is an application by defendant in error to advance this cause "in accordance with paragraph 3, Rule 26, of this court," for the reason as stated in said motion that

> "(the action in the State Court) is a criminal case, to-wit, a writ of error from the judgment of the Superior Court of Los Angeles County, State of California, affirming a judgment of the Recorder's Court of the City of

> South Pasadena, convicting the plaintiff in error of the violation of an ordinance of said City of South Pasadena."

The ordinance referred to is a Municipal ordinance and is found on page 3 of the transcript of record. In brief it prohibits and makes it unlawful for any person, etc., to maintain a billiard hall or pool room, or other place in the City of South Pasadena wherein any billiard, pool or combination billiard and pool table is kept for hire, unless such billiard, pool or combination billiard and pool table is operated in a hotel, etc. Plaintiff in error was fined the sum of $150 for such violation.

The ordinance provides, Section 4 (Tr. Rec., 4), that every person found guilty of violation of the ordinance (Tr. Rec., 8) shall be fined in the sum of not less than $25 nor more than $300 or imprisonment in the county jail, etc., etc. (Sec. 4, Tr. 4.)

Section 3 of Rule 26 of this court provides that

> "Criminal cases may be advanced by leave of court on motion of either party."

We respectfully submit:

A.

THAT AN ACTION TO RECOVER A PENALTY IMPOSED BY MUNICIPAL ORDINANCE IS NOT A CRIMINAL CASE.

While the case is entitled in the name of the People, the prosecution is on behalf of the City of South Pasadena, and is not a prosecution by the People, but is in fact and reality a prosecution by the city for

> "the crime of violating ordinance Number 262 of said City of South Pasadena." (Tr., 1.)

And the complaint is not made by the People, but by one "W. H. Johnston of the County of Los Angeles" (Tr., 1), who in said complaint alleges that the act of said Murphy

> "is contrary to the form of the ordinances in such cases made and provided. * * *"

In *Fortune* v. *Incorporated Town of Wilburton*, 142 Fed., 114 (C. C. A., 8th Cir.), the court said:

> "The offense of Fortune was not a statutory misdemeanor but was merely a violation of a local police regulation of the town. The complaint against him which was framed in the language of the ordinance would not have supported a conviction of any public offense under the statutes. The weight of the authority is that such an action is civil in character and not criminal, even though as in this case payment of the penalty assessed is authorized to be enforced by the arrest and detention of the person." (Citing a large number of cases.)

See also:

McMillan on Municipal Ordinances, Sec. 304.
City of Chicago v. *Knobel*, 232 Ill., 112, 114.
Bristol v. *Burrow*, 73 Tenn., 138.
Gehr v. *Woodruff*, 33 N. J. L., 213, 217.
Chafin v. *Waukesha County*, 62 Wis., 463, 467.
Greeley v. *Hammon*, 2 Colo., 94.
Gallatin v. *Tarwater*, 143 Mo., 40.
Commonwealth v. *Davenger*, 10 Phila., 478.
Jenkins v. *Cheyenne*, 1 Wyo., 287.

B.

BUT EVEN IF IT BE DETERMINED THAT THE CASE IS A "CRIMINAL CASE" NO GROUNDS ARE ADVANCED WHY THIS WRIT OF ERROR SHOULD BE GIVEN PRECEDENCE.

In *U. S.* v. *Norton*, 91 U. S., 558, this court said:

> "This is a criminal case * * * hereafter motions to advance upon this ground (that it is a criminal case and that questions in dispute will embarrass the operations of the government while they remain unsettled) must state the facts in such manner that we may judge whether the government will be embarrassed in the administration of its affairs by delay. In the present crowded state of the docket it is our duty to see that cases are not unnecessarily brought forward to the prejudice of others."

In *Ward* v. *Maryland*, 12 Wall., 163, in deciding a motion to advance a criminal case, this court said:

> "Probably it is made under the 30th Rule of the court, which provides that criminal cases may be advanced by leave of the court on motion of either party. Under that rule the motion is addressed to the discretion of the court, and, inasmuch as it appears that the defendant is not in jail, the court fails to see any reason for granting the motion."

We submit that there is no proper, legal or sufficient reason advanced why this writ of error should be advanced on the docket of this court.

We respectfully ask that the motion be denied.

LEVY MAYER and
ALFRED S. AUSTRIAN,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 204

J. L. MURPHY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

In Error to the Superior Court of Los Angeles County, State of California.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

LEVY MAYER,
ALFRED S. AUSTRIAN,
Attorneys for Plaintiff in Error.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 204

J. L. MURPHY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is a writ of error to the Superior Court of Los Angeles County, State of California. Plaintiff in error (hereinafter referred to as defendant) on January 14, 1908, and for several years prior to said date, had been engaged in conducting a public pool and billiard hall in the City of South Pasadena, California. Defendant had expended about Three Thousand Dollars for equipment, etc., to properly conduct his business. (Trans., 5.) On January 14, 1908, an ordinance was passed by the Board of Trustees

of said City of South Pasadena, which among other things, provides:

"Section 1. It shall be, and is hereby, made unlawful for any person or persons, individually or by association with others, either as owner, principal, clerk, agent, servant or employe to establish, open, keep, carry on, or assist in carrying on, or maintain or assist in maintaining any billiard hall, or pool room, or other place in the City of South Pasadena, where any billiard, pool, or combination billiard and pool table, or tables, is or are kept for hire or public use, and any person or persons, opening, keeping, carrying on, or assisting in carrying on, maintaining, or assisting in maintaining, any such place, herein specified in said City of South Pasadena, shall be guilty of a misdemeanor, and every act in violation of this section shall separately, or for each day of its continuance, be deemed a separate offense.

Provided, however, that nothing in this ordinance shall be construed or understood as prohibiting the owner, manager, or lessee of any hotel, universally recognized as a hotel, using a general register for guests, and having twenty-five bedrooms and upwards furnished as such, from keeping and maintaining any billiard, pool or combination billiard and pool table, or tables, for the use of regular guests only of said hotel, in a room provided for that purpose in the building in which said hotel is located, and at no other place, on receiving a permit to do so, from the Board of Trustees of the City of South Pasadena. Applications for such permits shall be in writing, and filed with the Board of Trustees at least five days before the same is granted. If on investigation, said Board finds the hotel for which such permit is desired, equipped and conducted as herein specified, it may, in its discretion, grant and issue such permit, without charge and for such time as desired by the applicant, but

in no event to extend beyond the date of the next succeeding municipal election; provided, if said Board of Trustees shall at any time become satisfied that any person to whom any such permit is granted, his clerk, agent or employee has permitted any person other than a regular guest of said hotel, or any person who has not in good faith become a regular guest of said hotel, or is guilty of a violation of any provision of this ordinance, they shall cancel, revoke and withdraw such permit and all rights thereunder, and no other permit shall thereafter be granted to said person." (Trans. 3.)

Section 2 of said ordinance makes any servant, etc., who violates the terms of said ordinance liable as principal. (Trans. 4.)

Sections 3 and 4 provide certain penalties for a violation of said ordinance including a fine not exceeding $300. or imprisonment not exceeding three months or both. (Trans. 4.)

On January 18, 1908, a complaint was made before O. W. Orcutt, Recorder of the City of South Pasadena, against defendant charging him with violating said ordinance (Trans. 1) and defendant was arrested (Trans. 2).

On September 3, 1909, said recorder imposed a fine of $150 upon said defendant, with an alternative judgment of 75 days' imprisonment, should said fine not be paid, etc. (Trans., 8.)

From this judgment defendant prosecuted an appeal to the Superior Court of Los Angeles County (Trans. 10).

On November 9, 1909, the judgment of the record-

er's court was by the Superior Court affirmed (Trans. 16).

Throughout the entire case in both courts the defendant properly preserved the

> questions (of) the validity of (the) ordinance * * * on the ground of its being repugnant to the constitution of the United States,"

and the decision being

> "in favor of the validity of said ordinance and the judgment of said Superior Court is (being) the final judgment of the highest court in this state in which a decision in said suit could be had"; this writ of error was duly allowed by the presiding Judge of said Superior Court. (Trans., 25.)

THE EVIDENCE.

The evidence heard upon the trial disclosed that prior to January 14, 1908, on which date the ordinance in question was adopted (Trans., 2) there had been no ordinance or statute prohibiting the business of conducting a public billiard and pool hall in South Pasadena (Trans., 6); that defendant on January 17, 1908, was engaged in such business in the City of South Pasadena, and that his pool and billiard hall was not connected with or a part of any hotel; that he had continuously for several years prior to 1908, been engaged in the same business as his means of livelihood (Trans., 5); that he had moved to new premises on January 1, 1908, and had expended about Three Thousand Dollars in fitting them up before the passage of said ordinance. (Trans., 5.) The evidence further disclosed that defendant's pool and billiard hall was equipped with new tables and

new furnishings and was in every respect neat and sightly. That the place where said business was established was at all times kept in a perfect sanitary condition, and at no time had there been anything about said premises, or in the manner of conducting said business which in the least could or would be offensive to the senses. That said business was patronized only by the business men and the best people of South Pasadena as a source of recreation and amusement. That at no time was there any loitering or lounging nor were there any persons of bad character permitted on said premises; that said business was conducted on strictly lawful and moral lines. That said premises are located in the business part of South Pasedena, and surrounded only by business buildings and vacant lots, and there is no residence within seven hundred feet of said premises. That said business was carried on and conducted in a quiet and peaceable manner, and without any boisterous or unusual noise of any kind, and the conduct of all persons who visited said place was quiet and orderly. (Trans., 6.)

ERRORS RELIED UPON.

While defendant's assignment of errors are numerous they all center in an attack upon the constitutionality of the ordinance in question. Classified, they may properly be referred to as follows:

1. That the judgment of the Recorder's court, affirmed by the judgment of the Superior Court convicting defendant of violating said ordi-

nance and imposing a fine upon said defendant, and an alternative punishment of imprisonment, is erroneous, inasmuch as said ordinance upon which said judgment is based is repugnant to the Constitution of the United States. (Trans., 22.)

2. That said ordinance upon which said charge and conviction is based, abridges the privileges and immunities of the defendant, a citizen of the United States, and deprives defendant of his liberty and property without due process of law, and denies to said defendant the equal protection of the laws, in violation of the Constitution of the United States. (Trans., 22, 3.)

BRIEF.

I.

THE POLICE POWER MAY BE EXERCISED TO PROTECT THE PUBLIC HEALTH, MORALS, SAFETY AND THE GENERAL WELFARE, BUT IT IS, AT ALL TIMES, SUBJECT TO THE CONSTITUTIONAL LIMITATIONS THAT IT MAY NOT ARBITRARILY TAKE AWAY THE LAWFUL RIGHTS OF A CITIZEN.

Lawton v. *Steele*, 152 U. S., 133, 137.
Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558.
Dobbins v. *Los Angeles*, 195 U. S., 223.
Yick Wo. v. *Hoskins*, 118 U. S., 356.
C., B. & Q. R. R. v. *Illinois*, 200 U. S., 561, 592-3.

II.

WHETHER A PARTICULAR REGULATION IS A VALID EXERCISE OF THE POLICE POWER IS ULTIMATELY A JUDICIAL, NOT A LEGISLATIVE, QUESTION.

Dobbins v. *Los Angeles*, 195 U. S., 223, 235.
Mugler v. *Kansas*, 123 U. S., 622, 661.
G. C. & S. F. Ry. Co. v. *Ellis*, 165 U. S., 150, 154.
Lochner v. *New York*, 198 U. S., 45, 60.

III.

IF A BUSINESS MAY BE SO CONDUCTED AS TO BE HARMFUL TO THE PUBLIC WELFARE, BUT IS NOT NECESSARILY SO, THE LEGISLATURE, UNDER ITS POLICE POWER, MAY REGULATE, BUT IT CAN NOT PROHIBIT, SUCH BUSINESS.

Cases cited under points I and II.

Also:

State v. *Hall*, 32 N. J. L., 158-159.

Pfingst v. *Senn,* 94 Ky., 556, 23 S. W., 358.
State v. *McMonies,* 75 Neb., 443, 106 N. W., 454; also *In re McMonies.*
Zanone v. *Mound City,* 103 Ill., 552, 558

A.

IF A THING IS NOT IN FACT A NUISANCE PER SE IT CANNOT BE MADE SO BY A MERE DECLARATION OF THE LEGISLATIVE WILL EXPRESSED IN AN ORDINANCE.

Yates v. *Milwaukee,* 77 U. S. (10 Wall.), 497, 505.
Boyd v. *Bd. of Councilmen,* 117 Ky., 199, 77 S. W., 669.
Bd. of Aldermen v. *Norman,* 51 La. Ann., 736, 25 So., 401.
Hume v. *Laurel Hill Cemetery,* 142 Fed., 552, 565.

B.

A BILLIARD AND POOL ROOM IS NOT A NUISANCE PER SE; IT IS NOT NECESSARILY HARMFUL TO THE PUBLIC WELFARE.

McMonies v. *McMonies,* 75 Neb., 443; 106 N. W., 454.
Ex parte Murphy, 8 Cal. App., 440; 97 Pac., 199.
Ex parte Meyers, 7 Cal. App., 528; 94 Pac., 870.
Pfingst v. *Senn,* 94 Ky., 556; 23 S. W., 358.
State v. *Hall,* 32 N. J. L., 158, 159.
Breninger v. *Belvidere,* 44 N. J., 350.
Morgan v. *State,* 64 Neb., 369.

IV.

EVEN IF AN ORDINANCE PROHIBITING ALL BILLIARD AND POOL ROOMS WERE VALID, THE PRESENT ORDINANCE IS UNCONSTITUTIONAL, IN THAT IT CONFERS PRIVILEGES AND IMMUNITIES ON SOME CITIZENS WHICH IT DENIES TO OTHERS AND THE DISTINCTIONS AND CLASSIFICATION SOUGHT TO BE DRAWN BY THE ORDINANCE ARE ARBITRARY, ARE NOT BASED ON NATURAL GROUNDS OF REASONABLENESS OR PUBLIC POLICY, AND DO NOT TEND TO PROMOTE THE PUBLIC WELFARE FOR

a. **IT PERMITS OWNERS AND MANAGERS OF HOTELS AND NO OTHERS TO CONDUCT POOL AND BILLIARD ROOMS.**

b. **IT PERMITS GUESTS OF SUCH HOTELS AND NO OTHERS TO PARTICIPATE IN THE GAME OF POOL AND BILLIARDS.**

c. **IT IN EFFECT GIVES SUCH HOTEL OWNERS A MONOPOLY IN THIS REGARD.**

d. **IT VESTS IN THE BOARD OF TRUSTEES OF SOUTH PASADENA AN ARBITRARY DISCRETION, UNCONTROLLED BY ANY RULES OR CONDITIONS GOVERNING THE GRANTING OR REFUSING OF THE RIGHT TO CONDUCT SUCH BUSINESS.**

L. S. & M. S. R. R. v. *Smith*, 173 U. S., 684.

Connolly v. *Union Sewer Co.*, 184 U. S., 540, 558, 563.

Cotting v. *Godard*, 183 U. S., 79, 112.

Re Yot Yot Sang, 75 Fed., 983.

Nichols v. *Watter*, 37 Minn., 264, 271.

State ex rel. McCue v. *Sheriff of Ramsey County*, 48 Minn., 236, 51 N. W., 112.

Lappin v. *District of Columbia*, 22 App. Cas., D. C., 68, 78.

Fiscal Court of Owen County v. *F. & A. Cox Co.*, 132 Ky., 738; 117 S. W., 296.

Bailey v. *People*, 190 Ill., 28, 37.

Yick Wo. v. *Hopkins*, 118 U. S., 356.

G. C. & S. F. Ry. v. *Ellis*, 165 U. S., 150, 155, 159, 165.

People v. *Warden of City Prisons*, 157 N. Y., 116, 51 N. E., 1006.

Boyd v. *Bd. of Councilmen*, 117 Ky., 199; 77 S. W., 669.

ARGUMENT.

I.

THE POLICE POWER MAY BE EXERCISED TO PROTECT THE PUBLIC HEALTH, MORALS, SAFETY, AND THE GENERAL WELFARE, BUT IT IS AT ALL TIMES SUBJECT TO THE CONSTITUTIONAL LIMITATIONS THAT IT MAY NOT ARBITRARILY TAKE AWAY THE LAWFUL RIGHTS OF A CITIZEN.

Briefly stated, this writ of error presents the question whether a municipality, without violating the constitutional prohibition, has the power and authority to pass under the guise of the exercise of police power an ordinance which provides:

> That no person shall carry on, conduct, or maintain a billiard hall where any billiard, pool or combination billiard and pool table is kept for hire or public use, without being guilty of a misdemeanor,—
>
> Provided that such prohibition shall not apply to the owner, manager, or lessee, of any hotel under the following conditions:
>
> (a) If his hotel is "*universally* recognized as a hotel."
>
> (b) If it uses "a general register."
>
> (c) If it has "twenty-five bedrooms and upwards."
>
> (d) If such table or tables are for "regular guests only of said hotel."
>
> (e) If said table or tables are located in a room provided for that purpose.
>
> (f) If a permit is granted so to do—to such person so operating said hotel. (Trans., 3.)

In other words, before a person can play at billiards he must become a "regular guest" of a hotel, and of a hotel having "25 rooms and upwards";

and before a person can engage in an otherwise harmless business, he must acquire a hotel having "25 rooms and upwards," and then not before it is "*universally* recognized" as such hotel, and then only if he uses a "*general* register," and having pursued his occupation to that extent his table or tables can be used "for *regular* guests only," and then all conditioned upon the unrestricted arbitrary discretion of the municipal authorities as to the granting of a license to permit him to pursue such business.

The defendant attacks the validity of the ordinance as violating the Fourteenth Amendment to the Constitution of the United States and the state maintains its validity as a proper exercise of the police power, relying on Section 11, Article II of the Constitution of California, for its validity; said section provides:

> " 'Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' "

That there are certain rights guaranteed to every citizen by the Constitution of the United States which cannot be affected by the exercise of the police power, is fully established. It is settled law, that any statute or ordinance enacted under the guise of police regulation, must promote the public safety, health, morals or general welfare, and cannot arbitrarily interfere with the constitutional rights of citizens to liberty and property, which include the right to contract freely and to use their property in any lawful

way, *i. e.*, any way not detrimental to the community. And although every reasonable intendment is to be made in favor of the constitutionality of an ordinance, yet the declaration of the legislature as to the public need is not conclusive, and it is ultimately a judicial question whether a particular regulation is reasonable or not.

The proper limits of the exercise of the police powers are stated by Mr. Justice Brown in *Lawton* v. *Steele*, 152 U. S., 133, 137, where this court said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

The same rule is laid down in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558, thus:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State. * * * As the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers must yield to that law. * * * The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety,

> but, if, by their necessary operation, its regulations *looking to either of those ends* amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

So in *Dobbins* v. *Los Angeles*, 195 U. S., 223, 236, in passing on an ordinance of the City of Los Angeles, where the city relied on the same clause of the Constitution of California depended on this case for power to pass the ordinance in question, Mr. Justice Day, speaking for this court, said:

> "It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

To the same effect are:

> *Yick Wo* v. *Hopkins*, 118 U. S., 356.
> *C., B. & Q. R. R.* v. *Illinois*, 200 U. S., 561, 592-3.

The ordinance in question does not pretend to regulate the business of operating a public billiard and pool room. It nowhere contains any provisions which if complied with will enable defendant to engage in that business unless he engages in a larger and more extensive undertaking, to-wit, the operation of a hotel with at least 25 rooms, etc.

Such an ordinance is not regulatory but prohibitory in effect.

At the same time the ordinance in question is not a prohibitory ordinance (strictly speaking) because it permits the conduct of a billiard and pool room "for hire or public use" provided only it is conducted in a hotel, etc.

Under either view, it is void. If it be contended that it is a prohibitory ordinance the answer is that under the Constitution the legislature cannot by ordinance or statute make that a nuisance which in fact is not a nuisance, and thus exterminate an otherwise lawful business. Such action deprives the defendant of his property without due process of law.

If it be contended that the ordinance is regulatory it is equally bad, because it goes beyond the means necessary to regulate it, classifies unreasonably, discriminates between those of a class, and such attempted classification bears no just or proper relation to the ends sought to be accomplished but is a mere arbitrary selection. Thus it deprives the defendant of the equal protection of the law.

II.

WHETHER A PARTICULAR REGULATION IS A VALID EXERCISE OF THE POLICE POWER IS ULTIMATELY A JUDICIAL, NOT A LEGISLATIVE, QUESTION.

It will probably be urged here as it was in the state court of California, that the Board of Trustees is conclusively presumed to have had before it some undisclosed condition or reason

for enacting the prohibitory ordinance in question as a necessary police regulation, and that the courts are bound to assume that such undisclosed and unknown reason was sufficient to justify the enactment complained of. But such is not the law. An inquiry into the question of whether an ordinance is a fair and reasonable exercise of the police power, or is unreasonable, and an arbitrary interference with the rights of property, is a judicial one, and the courts are not precluded by the fact that the Board of Trustees has expressed its judgment.

In *G. C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S., 150-154, Mr. Justice Brewer, speaking for this court, said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

In *Lochner* v. *New York*, 198 U. S., 45, 60, this court, by Mr. Justice Peckham, said:

> "It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law

> is sought to be justified as a valid exercise of the police power."

So in *Mugler* v. *Kansas*, 123 U. S., 622, 661, this court by Mr. Justice Harlan said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

To the same effect is *Hume* v. *Laurel Hill Cemetery*, 142 Fed., 552, (N. D. California, Hunt, J.).

III.

IF A BUSINESS MAY BE SO CONDUCTED AS TO BE HARMFUL TO THE PUBLIC WELFARE, BUT IS NOT NECESSARILY SO, THE LEGISLATURE, UNDER ITS POLICE POWER, MAY REGULATE, BUT IT CAN NOT PROHIBIT SUCH BUSINESS.

A

IF A THING IS NOT IN FACT A NUISANCE PER SE IT CANNOT BE MADE SO BY A MERE DECLARATION OF THE LEGISLATIVE POWER EXPRESSED IN AN ORDINANCE.

B

A BILLIARD AND POOL ROOM IS NOT A NUISANCE PER SE; IT IS NOT NECESSARILY HARMFUL TO THE PUBLIC WELFARE.

Under the limitations placed by the Constitution on the police power, it becomes necessary to deter-

mine whether the conducting of a pool and billiard room is necessarily dangerous to the public welfare. In relation to the police power, businesses are divided into three classes:

1. Those which are not dangerous to the public, either directly or indirectly, and cannot be subject to any police regulation whatever except as it falls within the power of taxation.

2. Those which are lawful, but which in their conduct might tend to the injury of the public health, morals or general welfare; under this head are such businesses as slaughter houses, soap factories, tanneries and public places of amusement; they may be regulated but not prohibited.

3. Those which are unlawful, such as the keeping of bawdy houses, gambling houses, etc.; these may be absolutely prohibited.

There is a marked distinction between the power of regulation and that of prohibition.

That pool and billiard halls are subject to reasonable regulation is conceded. But the same constitutional provisions which prevent any interference with businesses of the first class, also forbid any *unreasonable* interference with those of the second class; and the right of liberty is to be as zealously guarded in the one case as in the other. As stated by Tiedeman, "State and Federal Control of Persons and Property," Vol. I, Sec. 85, p. 238:

> "If it is unconstitutional to impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to dissipate the threatening evil. The

> Legislature has the choice of means to prevent evil to the public but the means chosen must not go beyond the prevention of the evil and prohibit what does not cause the evil."

This court has often recognized this distinction.

In *C., B. & Q. Ry.* v. *Illinois*, 200 U. S., 561, 593, Mr. Justice Harlan said:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, *beyond the necessities of the case*, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

In *Hume* v. *Laurel Hill Cemetery*, 142 Fed., 552, 555, 556, Judge Hunt said:

> "Like many other businesses, a cemetery may be so conducted as to become a nuisance; but to prevent any such danger there is a full power of regulation under the law, which may be exercised in a way to compel the owners of the cemetery to conform to any rules conducive to public health. * * * The ordinance amounts to the interdiction of a lawful business in the face of the fact that there is no impairment of, or danger to, either the health, safety, convenience or comfort of the public. It therefore is an unwarranted and arbitrary prohibition, and an ordinance which arbitrarily prohibits a lawful calling, without endeavor to regulate, is unreasonable and should be declared void."

The ordinance in question shows on its face that it does not seek to regulate, but to prohibit billiard and pool rooms (with the express exception of those run in connection with a hotel). It therefore becomes necessary to consider whether

the maintenance of billiard and pool rooms falls within the second or third class of business; whether it is a business lawful in itself, but which might tend in its conduct to injure the public and is therefore subject only to resonable regulation, or whether it is, *per se*, a nuisance; *i. e.*, necessarily harmful to the public welfare, or it may be contended that in testing the constitutionality of legislation in the exercise of the police power, a different rule should be applied to a useful as distinguished from a non-useful business. But this distinction is unsound. No lawful business, whether useful or not, is subject to prohibition or to unnecessary regulation, and its lawfulness cannot be made to depend upon the court's estimate of its usefulness. All rights of property, of contract, and of conduct, are held subject to the paramount demand of the public good; but there is no right of property, of contract, or of conduct, which, if it does not conflict with the public good, is not entitled to the full protection of the law. If a business is unlawful, that is if it is a nuisance *per se*, it is necessarily injurious to the public; if, as as said in *Alexander* v. *Tebeau*, 71 S. W., 24 Ky. L. R., 1305, 427, the nuisance "is not due to mismanagement, but inheres to the business," then the legislative power may prohibit such business. Otherwise the legislature may only regulate it, to prevent any improper or dangerous results, but it can not prohibit it; the right of citizens to conduct it in a proper manner, is safeguarded and protected as an exercise of the liberty guaranteed by the Constitution.

We are thus brought back to the question: is a

billiard hall or pool-room a nuisance *per se?* Stated thus baldly the question answers itself.

The game of billiards is so universally indulged in and recognized as a highly proper legitimate pastime and recreation that the courts will take judicial notice of its benefits and pleasures. We print as a footnote* a brief history of the game which we have taken from the Encyc. Britannica (Vol. 3), 11th Ed., 1910-11. In Cotton's Compleat Gamester, published in 1674, billiards is referred to as a

"most gentile, cleanly and ingenius game."

The courts wherever and whenever they have had

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*"Of the origin of the game, comparatively little is known—Spain, Italy, France and Germany all being regarded as its original home by various authorities. * * * The Dictionnaire Universal and the Academie des Jeux ascribed its invention to the English. Bouillet in the first work says: 'Billiards appear to be derived from the game of bowls. It was anciently known in England, where, perhaps, it was invented. It was brought into France by Louis XIV whose physician recommended this exercise.' In the other work mentioned we read: 'It would seem that the game was invented in England.' It was certainly known and played in France in the time of Louis XI. (1423-1483) Strutt, a rather doubtful authority, notwithstanding the reputation attained by his *Sports and Pastimes of the People of England*, considers it probable that it was the ancient game of paille-maille (pall-mall) on a table instead of on the ground or floor, an improvement he says 'which answered two good purposes: it precluded the necessity of the player to kneel or to stoop exceedingly when he struck the bowl and accommodated the game to the limits of a chamber.' Whatever its origin, and whatever the manner in which it was originally played, it is certain that it was known in the time of Shakespeare, who makes Cleopatra, in the absence of Anthony, invite her attendant to join in the pastime—

'Let us to Billiards; come Charmian.'

Ant. and Cleo., Act ii, Sc. 5.

In Cotton's Compleat Gamester, published in 1674, we are told that this 'most gentile, cleanly and ingenius game' was first played in Italy, though in another page he mentions Spain as its birth place. At that date billiards must have been well enough known, for we are told that 'for the excellency of the recreation it is much approved of and played by most nations of Europe, especially in England, there being few towns of note therein which hath not a public billiard table. Neither are they wanting in many noble and private families in the country.'"

occasion to refer to billiards have treated it as a high class sport and amusement and the conduct of the game as a business, as a legitimate occupation.

Even the California Court of Appeals in passing upon the validity of the very ordinance now in question (*Ex parte Murphy,* 8 Cal. App., 440, 444, 97 Pac., 199), said:

> *"We may concede at the outset that the business of conducting a public billiard and pool-room is not per se a nuisance."*

And the court in that opinion reaffirmed its prior decision in *Ex parte Meyers,* 7 Cal. App., 528, 530, 94 Pac., 870:

> *"That a billiard hall is immoral per se because it is public will hardly be contended by anyone."*

In *Morgan* v. *State,* 64 Neb., 369, the court said:

> "Such a room is not, we concede, *per se* a nuisance, but without regulation and supervision it is likely to become so anywhere. * * * The plaintiff's pool hall not being a nuisance *per se,* the village authorities *have no right to suppress it* as such until by its management and conduct it becomes a nuisance in fact." * * *

The same doctrine with reference to billiards and poolrooms is again laid down by the same court in *State* v. *McMonies,* 75 Neb., 443.

In *Pfingst* v. *Senn,* 94 Ky., 556, 563, the court in speaking of ten-pin alleys and billiard poolrooms said:—

> "Among the rights to be enjoyed,—indeed, we might say necessary to be enjoyed,—by a large class of persons in a crowded city is the right or privilege of attending public places of amusement."

In *Breninger* v. *Belvidere*, 44 N. J. L., 350, 352, the court, in passing upon a like ordinance, said:—

> "The town claims that the requisite authority to enact this ordinance is found in section 8 of the town charter, which provides, among other things, that the common council may pass and enforce ordinances and by-laws for the suppression of gambling houses, and such other by-laws and ordinances for the peace and good order of said town, as they may deem expedient, not repugnant to the constitution or laws of this state or of the United States. * * *
>
> The ordinance in question, so far as it prohibits the keeping of billiards for hire, is without authority and void, and the judgment below must fall with it, but I do not think it is a case in which costs should be given against the town."

In *State* v. *Hall*, 32 N. J. L., 158, the court said:

> "The first point on which the advisory opinion of this court is asked is, whether a ten-pin alley, kept for gain, in a populous village, and open to public use, is *per se* a disorderly house or public nuisance."
>
> "In a legal point of view, a house may be disorderly in two ways, viz., first, from the end or purpose to which it is appropriated; and second, from the mode in which it is kept. The end or purpose for which the house is designed, will render the keeping of such house illegal, if it be such as, of necessity, contravenes the provisions of any public statute; or be such as must be injurious to the public morals, peace, or health; or to the comfort of society. Instances of this sort are brothels, or places kept as a rendezvous for thieves. But if the purpose of the house be not necessarily injurious to society, the keeping of such house is never criminal, unless it be made so by the manner in which it is conducted. No example, I think, can

> be found in any adjudication which is authority in this court, which holds that the law forbids the citizen to use his house for any purpose which, in itself, is not necessarily hurtful to the community. That the particular business of the house may, by the neglect of design of the keeper, sometimes, or many times, be perverted to immoral or other noxious purposes, cannot take away from the generality the right to carry on such business."

In *Tiedeman on State and Federal Control of Persons and Property,* Vol. 1, Sec. 86, p. 239, the author says:

> "A calling may be generally harmless, when prosecuted by some classes of persons, and very harmful when engaged in by others. Thus, for example, it can readily be seen that the keeping of billiard saloons, of bar rooms, and other public resorts by women, will prove highly injurious to the public morals, while there is no such peculiar danger arising from the keeping of such places by men."

These and many other cases establish as a matter of law what is self-evident as a matter of fact, —that places of public amusement, whether public gardens or amusement halls, billiard rooms or bowling alleys, ball parks or theaters, are not nuisances, though all of them may become nuisances, if improperly conducted. And if a thing is not in fact a nuisance the law is settled that it cannot be made one by the mere declaration of the legislature.

In *Boyd* v. *Board of Councilmen,* 117 Ky., 199, 211, the court, quoting Brannon on the Fourteenth Amendment, p. 174, said:

> " 'A city or town cannot, by its mere declaration that a thing is a public nuisance, make a

> nuisance of that which is not essentially such. The question of nuisance or no nuisance is one for judicial review.' "

See also *Yates* v. *Milwaukee,* 10 Wall., 497.

So the court in *Board of Aldermen* v. *Norman,* 51 La. Ann., 736, 738, 25 So., 401, 402, quotes Wood on Nuisances, Sec. 744, to the effect,

> "That the fact that a particular use of property is declared a nuisance by an ordinance of a city or town does not make that use of property a nuisance unless it is in fact so."

It therefore clearly appears from the decision of the courts (including those of California) that the business is not *per se* a nuisance. If it is not a nuisance, it can not be prohibited, but only regulated; if it is a nuisance *per se* it can not be licensed or regulated, but if legislated upon at all it must be prohibited. In the present case the ordinance permits the conduct of the business, if it be run in a hotel of twenty-five or more rooms, etc., thus showing that the ordinance itself does not declare the business to be a nuisance.

As stated in *Stetson* v. *Faxon,* 36 Mass., 147, 154, citing an old English case:

> "The king himself can not give license to any to commit a nuisance."

Or, as put in slightly different form in *State* v. *L. N. A. & C. Ry.,* 86 Ind., 114,—

> "What the legislature authorizes can not be a public nuisance."

It is apparent that the ordinance does not by its term attempt to regulate, but rather to prohibit (with one exception) the business in ques-

tion. Not only does this clearly appear from a reading of the ordinance, but such is the construction placed upon it by the Court of Appeals of California:

> "Its purpose is not to license but to prohibit."
>
> *Ex parte Murphy*, 8 Cal. App., 440, 442.

In the same opinion, however, the court holds that the ordinance if applied to laundries, tanneries, etc., would be void because "as to those, the power of the municipality is to regulate only," but states that such doctrine does not apply to billiard rooms and other places of amusement, by reason of a distinction (?) between "useful" and "non-useful" businesses. We submit that such reasoning is not sound. Who would contend that a municipality could arbitrarily prohibit the business of theatres, amusement parks, and the like, which, though not productive of material wealth to the patrons, are not only useful but necessary to the welfare and happiness of a crowded community.

But even if there be a legal distinction between, and a different rule of law applicable to, non-useful as distinguished from useful businesses, still no valid law or ordinance can be enacted which in its terms is preferential or discriminatory.

IV.

EVEN IF AN ORDINANCE PROHIBITING ALL BILLIARD AND POOL ROOMS WERE VALID, THE PRESENT ORDINANCE IS UNCONSTITUTIONAL, IN THAT IT CONFERS PRIVILEGES AND IMMUNITIES ON SOME CITIZENS WHICH IT DENIES TO OTHERS, AND THE DISTINCTIONS AND CLASSIFICATIONS SOUGHT TO BE DRAWN BY THE ORDINANCE ARE ARBITRARY; ARE NOT BASED ON NATURAL GROUNDS OF REASONABLENESS OR PUBLIC POLICY AND DO NOT TEND TO PROMOTE THE PUBLIC WELFARE.

Turning to a consideration of the ordinance as a regulation, we submit that even if an ordinance prohibiting all billiard and pool-rooms could possibly be upheld, which we deny, the present ordinance is unconstitutional in that it discriminates arbitrarily between different classes of citizens, and imposes unreasonable regulations upon them. The objects sought to be attained are, doubtless, the protection of the morals, peace, health and welfare of the community. The court must be able to see some clear and reasonable connection between the assumed purpose of the law and the actual provisions thereof, and that the law tends in some plain and appreciable manner towards the accomplishment of the object sought to be attained. The restrictions imposed must apply equally to all citizens of the same class.

In *Gulf, Colorado and Santa Fe Ry.* v. *Ellis,* 165 U. S., 150, 165, this court by Mr. Justice Brewer said:

> "* * * the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not only that a classification has been made, but also that it is

> one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

This language is quoted with approval in *Connolly* v. *Union Sewer Co.*, 184 U. S., 540, 560.

The one business above all which is considered by the courts as non-useful is the liquor traffic.

Still every ordinance regulating or prohibiting it must be general in its terms and apply equally to all.

As said by the Supreme Court of Illinois in *Zanone* v. *Mound City*, 103 Ill., 552-8:

> "Equality before the law is a fundamental principle of our institutions, and no reason is perceived why applicants for license to keep a dramshop, who are suitable persons to be licensed, should not stand on an equality before the law. Captious discriminations among men of that trade are as obnoxious as would be such discriminations in regard to other trades."

The regulations adopted (limiting the conducting of billiard and pool rooms to hotel owners, the use and enjoyment of them to hotel guests and leaving the right to grant permits for their maintenance to the uncontrolled discretion of the Board of Trustees), do not tend to promote the health, morals or welfare of the community; they in no way exclude persons of bad character from either conducting or playing in the billiard and pool rooms, and are unreasonable; and we submit also that the ordinance discriminates in favor of hotel keepers and guests in violation of the Fourteenth Amendment, and that it puts unlawfully an arbitrary and uncontrolled power in the hands of the Trustees. The

remarks of this court on the Chinese laundry ordinance, in *Yick Wo* v. *Hopkins,* 118 U. S., 356, 366, are applicable here:

> "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons."

In *Cotting* v. *Godard,* 183 U. S., 79, 112, Mr. Justice Brewer points out, as an illustration of obviously unconstitutional legislation, an attempted distinction between a railroad hauling 100 passengers and one hauling 99, or a division of shoe dealers into those selling 10 pairs per day and those selling a less number; and, after instancing conjectural legislative enactments similar to the ordinance in question, as illustrating the height of absurdity, says:—

> "There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day per year. It is the same business, in all its essential elements, and the only difference is that one does more business than the other, but the receipt of an extra 2 head of cattle per day does not change the character of the business."

Neither is there any difference in the character of the business of a hotel having *24* rooms and one having *26* rooms. Or perhaps it may not be a violent assumption that there is only one hotel in South Pasadena having as many as *25* rooms.

In *re Yot Sang,* 75 Fed., 983, 4, 5, the court had be-

fore it an act of the Legislature of Montana which provided that every person conducting a laundry wherein more than one person is employed should pay a license fee of $25 per quarter and imposed a license fee of only $15 per quarter upon steam laundries. Judge Knowles held the statute void because of such discrimination.

In *Nichols* v. *Walter*, 37 Minn., 264, 271, the court in passing upon the validity of a law of Minnesota with reference to the removal of county seats, the law being attacked upon the ground of arbitrary classification, etc., among other things said:—

> "The marks of distinction on which the classification is founded must be such in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation.' Or, to state it differently though not so well, the true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

In *State* v. *Sheriff of Ramsey County*, 48 Minn., 236, 240, the court had before it a law which declared the emission of dense smoke within the City of St. Paul a nuisance. Section 1 contained a provision that:

> "Nothing herein contained shall be construed to apply to manufacturing establishments using the entire product of combustion, * * * within the building where they are generated or within a radius of 300 feet therefrom."

In holding this law invalid the court said:

> "No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing, or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. * * *"

In *Lappin* v. *District of Columbia,* 22 App. Cases, D. of C., 68, 78, the court passed upon an act of Congress which imposed a license tax of $250 on general brokers, with the exception that the Washington Stock Exchange shall pay $500 per annum in lieu of a tax on members thereof for business done on such exchange, and providing further that a member of the exchange who confines himself exclusively to business thereon is not a general broker, and is not therefore required to pay the license tax. The law contained a further provision that any broker who is a member of a regular exchange located outside of the District of Columbia, shall pay a license tax of only $100 per annum.

The court held this act to be an unlawful discrimination and as such void, and said:

> "But it is equally clear that the power of selection for classification is not an arbitrary one, but must have a reasonable foundation. It 'must always rest upon some difference which bears a reasonable and just relation to the act

> in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S., 150, 155. * * *"

In *Fiscal Court of Owen County* v. *F. & A. Cox Co.,* 132 Ky., 738, 117 S. W., 296, the court had before it a municipal license order classifying vehicles for license tax. The order was attacked on the ground that it unjustly discriminated between one, two, three and four-horse wagons. In holding the order void the court said:

> "Furthermore, the order itself shows that the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. * * * It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class, but it cannot unjustly discriminate between the subdivisions so made. As the order in question unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons, it follows that the license fee of $200, imposed upon four-horse wagons, is therefore void."

In *Bailey* v. *The People,* 190 Ill., 28, 37, the Supreme Court of Illinois had before it a statute which among other things provided (Sec. 16) that it should be unlawful for more than six persons to occupy the same room at the same time for sleeping purposes in any lodging house, and that no room in such lodging house should be occupied for sleeping purposes which does not contain 400 cubic

feet or more space for each person sleeping therein. The court, in holding such statute void said:

> "The public health is less endangered by a cleanly and well conducted lodging house than by a filthy, ill-managed, disease-breeding hotel or boarding house. The lodging of more than six persons in any one room in a cleanly lodging house cannot be condemned, from a sanitary point of view, any more than the lodging of a like number of guests in one room in a hotel or boarding house. If intended as a measure to protect health, the act should have been directed against the evil which threatens to introduce sickness or disease, whether found in a lodging house, boarding house or hotel, and as its penalties are not so leveled it can but be regarded as partial and discriminatory legislation."

We submit that if the ordinance be considered as an attempt to regulate the conducting of billiard halls and poolrooms, it is unreasonable and discriminatory, gives the Board of Trustees an unlawful arbitrary discretion, and violates the constitutional provision that "No state shall deny to any person within its jurisdiction the equal protection of the laws." If, on the other hand, it be considered, as it should be, and as it was intended to be by the enacting Board, and understood to be by the state court, an attempt not to regulate but to prohibit the conducting of billiard halls and pool rooms, (making by a subsequent proviso an express exception in the case of hotel keepers) it violates not only the above cited clause of the Fourteenth Amendment, but also those clauses which provide that "no state shall abridge the privileges and immunities of citizens of the United

States," and that "no state shall deprive any person of * * * liberty or property without due process of law."

Legislation that attempts to take from the people the right to conduct a lawful business because there might be some wrongdoers in it, is insufferable, and, we urge, unconstitutional and void. We submit therefore, that the ordinance under consideration should be so held by this honorable court.

Respectfully submitted,

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ALFRED S. AUSTRIAN,
Attorneys for Plaintiff in Error.

Chicago, Ill., February 10, 1912.

IN THE

Supreme Court

OF THE

United States.

October Term, 1911.

No. 204

J. L. Murphy,
Plaintiff in Error,
vs.
The People of the State of California,
Defendant in Error.

Brief and Argument on Behalf of Defendant in Error.

BRIEF.

I.

MUNICIPALITIES IN THE STATE OF CALIFORNIA, IN THE EXERCISE OF THE POLICE POWER CONFERRED UPON THEM BY SECTION 11, ARTICLE XI, OF THE CONSTITUTION OF CALIFORNIA, MAY EITHER REGULATE OR PROHIBIT, AND UNDER SUCH POWER THEY MAY PROHIBIT A THING WHICH IS NOT A NUISANCE PER SE.

Constitution of State of California, section 11, article XI;

Odd Fellows' Cemetery Association, *et al.*, v. San Francisco, *et al.*, 140 Cal. 226;
Ex parte Murphy, 8 Cal. App. Rep. 440; 97 Pac. Rep. 199;
Ex parte Lacey, 108 Cal. 326.

II.

THE CONDUCTING AND KEEPING OF BILLIARD HALLS AND POOL ROOMS FOR HIRE OR PUBLIC USE IS A CONSTANT MENACE TO THE PUBLIC PEACE AND MORALS, AND SUCH PLACES HAVE A TENDENCY TO WEAKEN AND DEPRAVE PUBLIC MORALS, AND ANYTHING WHICH IS A MENACE TO THE PUBLIC PEACE AND MORALS AND WHICH TENDS TO WEAKEN AND DEPRAVE PUBLIC MORALS MAY BE REGULATED BY CONTROL AND REGULATION OR ENTIRELY PROHIBITED.

Goytino v. McAleer, *et al.*, 88 Pac. Rep. 991;
Ex parte Myers, 6 Cal. App. 273;
Ex parte Murphy, 8 Cal. App. Rep. 440; 97 Pac. Rep. 199;
City of Tarkie v. Cook, 120 Mo. 1;
Ex parte Shrader, 33 Cal. 279;
Ex parte Tuttle, 91 Cal. 589;
Odd Fellows' Cemetery Association, *et al.*, v. San Francisco, *et al.*, 140 Cal. 226;

City of Clearwater v. Bowman, 72 Kansas 92; vol. 3 Annotated Statutes Missouri Sec. 6010;

State v. Thompson, 160 Mo. 333;

Tanner v. Trustees of Albion, 5 Hill (New York) 121;

Cooley's Constitutional Limitations, 7th Ed. page 884;

Hall v. State, 34 S. W. Rep. 22;

Webb v. State, 17 Texas Appeals 205;

State v. Jackson, 39 Mo. 420;

Rex v. Hall, 2 Keb. 846;

Fertilizing Co. v. Hyde Park, 97 U. S. 659;

Mugler v. Kansas, 123 U. S. 669;

Crowley v. Christensen, 137 U. S. 87;

Cooley's Constitutional Limitations, 6th Ed. 705;

Booth v. Illinois, 184 U. S. 425;

City of Corinth v. Crittenden, 94 Miss. 41.

III.

A Broad Distinction Is Recognized Between Useful and Non-useful Businesses in the Exercise of the Police Power by Municipalities, and the Billiard and Pool Room Business Is Not a Useful Business.

Freund on The Police Power, Sec. 59;

Crowley v. Christensen, 137 U. S. 86;

Ex parte Murphy, 8 Cal. App. Rep. 440; 97 Pac. Rep. 199;
Goytino v. McAleer, *et al.*, 88 Pac. Rep. 991;
City of Tarkio v. Cook, 120 Mo. 1;
Ex parte Shrader, 33 Cal. 279;
Ex parte Tuttle, 91 Cal. 589;
Odd Fellows' Cemetery Ass'n., *et al.*, v. San Francisco, *et al.*, 140 Cal. 226;
Munn v. Illinois, 94 U. S. 113;
In re Smith, 143 Cal. 368.

IV.

THE ORDINANCE PROHIBITS THE PUBLIC POOL AND BILLIARD BUSINESS, MAKING NO EXCEPTIONS, HENCE IT IS NOT DISCRIMINATIVE OR CLASS LEGISLATION.

Ex parte Christensen, 85 Cal. 208;
Ex parte Murphy, 8 Cal. App. Rep. 440; 97 Pac. Rep. 199;
In re Murphy, 155 Calif. 322;
Ex parte Koser, 60 Cal. 177;
Goytino v. McAleer, 88 Pac. Rep. 991;
The People *Ex rel* August Schwab, Appellant, v. Hugh J. Grant, Mayor, etc., respondent, 126 N. Y. 473;
City of Sonora v. Curtain, 137 Cal. 587;
California Reduction Co. v. Sanitary Reduction Works, 126 Fed. Rep. 29;;
Otis v. Parker, 187 U. S. 606;
Ex parte Tuttle, 91 Cal. 589;
State v. Thompson, 160 Mo. 333;
In re Kelso, 147 Cal. 609;
Ex parte Haskell, 112 Cal. 412.

ARGUMENT.

I.

MUNICIPALITIES IN THE STATE OF CALIFORNIA, IN THE EXERCISE OF THE POLICE POWER CONFERRED UPON THEM BY SECTION 11, ARTICLE XI, OF THE CONSTITUTION OF CALIFORNIA, MAY EITHER REGULATE OR PROHIBIT, AND UNDER SUCH POWER THEY MAY PROHIBIT A THING WHICH IS NOT A NUISANCE PER SE.

The city of South Pasadena is a city of the sixth class, under the general municipal corporation law of the state of California, and among its powers is that of the police power, conferred upon it, as well as upon all cities in this state, by section 11, article XI, of the constitution of the state of California, which section reads as follows:

> "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

In the case of Odd Fellows Cemetery Association *et al.* v. San Francisco *et al.*, 140 Cal. 226, the Supreme Court of the state of California, on pages 230 and 231, said:

> "A number of cases are cited by the appellant from other states bearing upon the question of the police powers of cities or towns under special and limited grants contained in their respective charters. Generally speaking, these authorities have no ap-

> plication to the case in hand. The power conferred by the constitution in this respect, subject to the two exceptions, that it is local to the city and that it is subject to general laws, *is as broad as that of the legislature itself.*"

This case plainly states the broadness of the scope of municipal police power in the state of California, and also indicates why authorities from other states on the police power of cities of such states are not in point here.

As was said by the court in *Ex parte* Murphy, 8 Cal. App. Rep. 440 (97 Pac. Rep. 199), referring to said section 11 of article XI of the constitution:

> "Under this provision the city's power to legislate upon all matters included within its terms is limited only by its territorial boundaries, provided that such legislation shall not conflict with general laws."

And the court in that case cites Odd Fellows Cemetery Association *et al.* v. San Francisco *et al., supra.*

There are two methods of the exercise of the police power under our constitution. One is by regulation, and the other by prohibition. The Supreme Court of the state of California, in the case of *Ex parte* Lacy, 108 Cal. 326, held (quoting from *syllabi*):

> *"It is not necessary to the exercise of the police power in regulating a business that it shall constitute a nuisance per se; but the power to regulate or prohibit conferred upon*

the board of supervisors not only includes nuisances, but extends to every thing expedient to be regulated or prohibited for the preservation of the public health or general welfare."

The Supreme Court of California also said in Odd Fellows Cemetery Association *et al.* v. San Francisco *et al., supra,* at page 231:

> "The exercise of this power is not limited to the regulation of such things as have already become nuisances or have been decleared to be such by the judgment of a court. 'The power to regulate or prohibit conferred upon the board of supervisors not only includes nuisances, but extends to everything expedient for the preservation of the public health, and the prevention of contagious diseases.' (*Ex parte* Shrader, 33 Cal. 284.)"

II.

THE CONDUCTING AND KEEPING OF BILLIARD HALLS AND POOL ROOMS FOR HIRE OR PUBLIC USE IS A CONSTANT MENACE TO THE PUBLIC PEACE AND MORALS, AND SUCH PLACES HAVE A TENDENCY TO WEAKEN AND DEPRAVE PUBLIC MORALS, AND ANYTHING WHICH IS A MENACE TO THE PUBLIC PEACE AND MORALS AND WHICH TENDS TO WEAKEN AND DEPRAVE PUBLIC MORALS MAY BE REGULATED BY CONTROL AND REGULATION OR ENTIRELY PROHIBITED.

The game of pool or billiards may be an innocent game when not conducted as a business, but

the conducting of the public pool and billiard business is not a harmless or innocent business. By the very nature of the business there is brought together an aggregation of persons over which the proprietor has very little if any control, by reason of its being a public resort. Here congregate the loafer, the idler, the gambler, and the vicious, forming an excellent opportunity for all sorts of schemes for falling upon the unsuspecting, for committing depredations, for defrauding the innocent and the making of the place a hot bed for crime and wrong doing.

A very strong case on this question is the case of Goytino v. McAleer *et al.*, 88 Pacific Reporter 991 (District Court of Appeal, Second District of California). This was a proceeding in mandamus to compel the board of police commissioners of the city of Los Angeles to issue a permit authorizing the city clerk to issue to petitioner a license to conduct a pool room and pool tables at a certain place in said city. The ordinance in force affecting, among other things, pool rooms, provided that no license should issue for the conducting of a pool room or operating a pool table until a permit therefor be had from the police commissioners, and that they could issue a permit only upon petition of the party intending to operate, accompanied by the consent of a majority of the property owners within the block where the permit was sought. Section 3 of the ordinance

empowered such board "to make such rules and regulations for the granting of permits as may be proper or necessary for the maintenance of public order, the promotion of public morals and the orderly conduct of such places, or the better enforcement of the provisions of the ordinance." Petitioner's application for a permit was denied by the board. The court on pages 991 and 992 say:

> "Petitioner does not question the legality of the ordinance or ordinances in any regard, save as to the provisions of section 3 thereof, and as to which he contends that the power of regulation therein contained gives the right to prohibit certain kinds of business which he claims cannot be exercised, except in relation to nuisances *per se*. 'The power to regulate or prohibit * * * not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagious diseases' (*Ex parte* Shrader, 33 Cal. 284), *and to which may be added that it extends to everything expedient for the promotion of public morals, welfare, or safety. It is only when a business is lawful and has no injurious tendency that the governing body cannot say who shall and who shall not exercise the right itself.* County of Los Angeles v. Hollywood Cemetery Association, 124 Cal. 344, 57 Pac. 153; 71 Am. St. Rept. 75.
>
> *"The business of conducting a pool table cannot be said to be a useful employment or business. Nor can it be said that as ordinarily, if not invariably conducted, such business might not within the limits of reasonable probability be attended with uses injurious*

> *to public peace and morals. Whatever of danger or menace to such public interests is threatened by the establishment and conduct of such business is a question of fact which the ordinance authorizes the board of police commissioners to determine. Ex parte* Shrader, *supra.* Such determination is conclusive. *Ex parte* Lacy, 108 Cal. 329; 41 Pac. 411; 38 L. R. A. 640; 49 Am. St. Rep. 93."

To the same effect is the case of *Ex parte* Myers, 6 Cal. App. Dec. 273. And the court in *Ex parte* Murphy, 8 Cal. App. Rep. 440 (97 Pac. Rep. 199), cite these two cases with approval.

In the case of the City of Tarkio v. Cook, 120 Mo. 1, the court say:

> *"Keepers of billiard-tables are not recognized by the state as exercising a useful occupation. * * * Public billiard-halls are regarded by many as vicious in their tendencies, leading to idleness, gambling, and other vices."*

We have yet to find an authority anywhere which, in touching upon this question, does not recognize in the public billiard-hall and pool room elements inimical to public morals and tendencies toward the weakening and enervating of the morals of the community. And we have yet to find an authority that declared invalid muncipal legislation prohibiting the public billiard-hall and pool room, where the prohibitory power conferred upon the municipality covered such occupations—that the power conferred by the legisla-

tive body was constitutional is nowhere questioned.

The proposition that anything which is a menace to the public peace and morals and which tends to weaken and deprave public morals may be regulated by control and regulation or entirely prohibited is strongly supported by the decisions of the Supreme Court of the state of California. The same is true of anything tending to injure the public peace or health. And we contend that it is a matter altogether within the discretion of the legislative body of the municipality as to whether it shall prohibit or only regulate as to all matters endangering, or tending to endanger, the public peace, safety, or morals. In the case of *Ex parte* Shrader, 33 Cal. 279, the Supreme Court of California say on pages 284 and 285:

> "The power to regulate or prohibit conferred upon the board of supervisors not only includes nuisances, *but extends to everything 'expedient for the preservation of the public health and the prevention of contagious diseases.'* Now there are many things not coming up to the full measure of a common law or statute nuisance, that might, both in the light of scientific tests and of general experience, pave the way for the introduction of contagion and its uncontrollable spread thereafter. Slaughter houses, as ordinarily, and perhaps invariably, conducted in this country, might, within the limits of reasonable probability, be attended with these consequences. *A competent legislative body has passed upon the question of fact involved,*

and we cannot go behind the finding. So far as we can know on this record, the power conferred has been exercised intelligently and in good faith."

The Supreme Court of California said in the case of *Ex parte* Tuttle, 91 Cal. 589, at page 591:

"Any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition by the state; and that gambling, in the various modes in which it is practiced, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question.

"The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the law-making body. Whether it shall entirely prohibit or only regulate by confining such practices within prescribed limits,— whether the law shall apply to every kind of gambling or only to those games or wagers in which evil effects appear with greatest prominence,—*must be determined primarily by the legislative department of the state, or of the municipality authorized to exercise this great power,* which is conferred for the purpose of securing the public safety and welfare; *and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial rela-*

tion to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive. (Mugler v. Kansas, 123 U. S. 661; Matter of Jacobs, 98 N. Y. 98; 50 Am. Rep. 636; Watertown v. Mayo, 109 Mass. 315; 12 Am. Rep. 694; *Ex parte* Keating, 38 Cal. 702.) It is manifest, we think, under this rule, that the ordinance in question cannot be declared invalid."

It seems to us that this last case completely covers the points raised against the ordinance in the case at bar, and fully answers them.

Again in the case of Odd Fellows Cemetery Association *et al.* v. San Francisco *et al.*, 140 Cal. 226, the court say at pages 231 and 232:

> *"Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past.* It is well settled that cemeteries in cities are subject to regulation or suppression by the exercise of these police powers. (People v. Pratt, 129 N. Y. 68; Presbyterian Church v. Mayor, etc., 5 Cow. 538; Coates v. Mayor etc., 7 Cow. 585; Kincaid's Appeal, 66 Pa. St. 411; Sohier v. Trinity Church, 109 Mass. 22; City Council v. Wentworth Street Baptist Church, 4 Strob. 309; Humphreys v. Front-Street Methodist etc. Church, 109 N. C. 132.)"

Again at page 234:

> *"In the enactment of police regulations, the legislative body is not confined to present conditions alone, but may look to the future and make such provisions as may be reasonably expected to be necessary to promote and preserve the public health and welfare in the immediate growth and progress of the city."*

The court in the case of *Ex parte* Murphy, 8 Cal. App. Rep. 440 (97 Pac. Rep. 199) in passing upon this point said:

> "It thus appears that a *public billiard hall and poolroom may*, by reason of its environment or conditions existing in some communities, *constitute a menace and danger to the morals and well-being of the citizens thereof; and it is, therefore, a subject for regulation or absolute prohibition*, notwithstanding the fact that it is not a nuisance *per se*, *the right of the city depending upon a question of fact the existence of which it is conclusively presumed the board of trustees has properly passed upon, and the courts cannot go behind such finding.* (*Ex parte* Shrader, 23 Cal. 279.) Regulation measures, not extending to the stringency of prohibition, might afford adequate protection in some communities, while in others conditions might exist by reason of which the public welfare demanded the absolute suppression of the business.
>
> *"In all cases, however, the extent to which the power shall be exercised is a matter for the legislative body of the municipality to determine. The power of the legislative body of the state, under its police power, to enact general laws prohibiting pool rooms and billiard halls cannot be questioned*, and it must

follow, in the absence of such general laws, that the police power of a municipality, within its territorial limits, under section 11 of article XI of the constitution, is co-extensive with that of the state."

Among the late writers on police power we think there are none who stand higher than Freund, and in his work on The Police Power, under section 193, relating to billiard halls and bowling alleys, he says:

"The legislative power to suppress the keeping of such places for hire does not appear to be subject to doubt."

The decision of the court in the case of the City of Clearwater v. Bowman, 72 Kansas, page 92, upholds a city ordinance prohibiting pool tables. A statute of the state of Kansas gives cites power to suppress billiard tables.

A statute of the state of Illinois, granting powers to municipalities, provides, section 44,

"To license, regulate, tax or *prohibit* and *suppress billiard,* bagatelle, pigeon hole, *or any other table or implements* kept or used for a similar purpose in *any place or public resort,* pin alleys and ball alleys."

In the statutes of the state of Missouri, relating to the powers of incorporated villages, vol. 3 Annotated Statutes of Missouri, is the following grant of power:

"Section 6010. May Pass What Ordinances:

> "Such board of trustees shall have power to pass by-laws and ordinances to prevent and remove nuisances; to provide for licensing and regulating and prohibiting dramshops and tippling houses, to license, tax, regulate and *prohibit* ball and ten-pin alleys, *billiards* and *pool tables* or other tables upon which games are played for pay or amusement."

The ordinance in the case at bar is just as valid as any statute the legislature of either of the states of Kansas, Illinois, or Missouri could pass upon the subject.

The prohibition of acts or things tending to corrupt and weaken public morals is not an infringement upon the inherent right of any citizen. As was said by the court in State v. Thompson, 160 Mo. 333, at page 349:

> "Gaming, sales of intoxicating liquors, houses of prostitution and any practice *which tends to demoralize, weaken and corrupt the morals may be regulated by the state* and confined to certain localities or *prohibited altogether* either under its police powers *without infringing upon the inherent rights of any of its citizens.*"

We contend that common experience has shown that such occupations as the one involved in the case at bar have a tendency to, and do degrade the public morals.

There are two cases, namely, State *ex rel* McMonies v. McMonies, 106 N. W. Rep. 454, and Breninger v. Belvidere, 44 N. J. 350, which have

been heretofore, when plaintiff in error was before the Superior Court of Los Angeles county and when before the District Court of Appeal, Second District of California, on writs of *habeas Corpus,* based on the case at bar, urged by petitioner against the ordinance in the case at bar. An examination of these two cases at once reveals that they have nothing whatever to do with the points raised here. The ordinances in these cases were declared invalid for the reason that municipalities in these states must have express authority from the legislature to enact such ordinances, which in these two instances the municipality did not have. It was wholly a question of power conferred by the legislature, which, of course, could not arise here. And as we hereinbefore cite, decisions on the police power from other jurisdictions are inapplicable here. Even in the McMonies case it was cited that a certain class of cities had the power conferred upon them to prohibit billiard and pool rooms, but not the municipality involved in that case. Permit us to again say that nowhere have we found a court decision or legal authority holding that a statute or ordinance prohibiting billiard and pool rooms was unconstitutional or invalid.

A strong case on a similar occupation or business is the case of Tanner v. Trustees of Albion, 5 Hill (New York) 121.

This was an action to recover a penalty for the violation of a village ordinance prohibiting the keeping of ten-pin alleys for gain. The court held that keeping of such place could be prohibited by a municipal corporation. On pages 123, 124, 125 and 126 the court has said:

> "By Court, Cowen, J. This case has been argued mainly on the general words at the conclusion of the fourth section of the village charter: Sess. L. of 1828, pp. 447, 448. So far as the arguments go on these, they need not be considered for I am of opinion that the offense prohibited is within the more particular words. Among other things, the trustees are authorized by that section to make by-laws relative to slaughter-houses and nuisances generally. The by-law in question provides, that it shall not be lawful for any person to keep or maintain any ball-alley, or apparatus, alley, building, or inclosure, constructed, or used for the purpose of playing thereon or therewith, at the game called or known by the name of nine-pins or ten-pins, for gain, reward, or emolument of any kind, or in any manner whatsoever. *Establishments of this kind in populous communities are, at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and detain them from their business.* When built and kept on foot for gain, the owner is interested to *invite* and *procure* as full an attendance as possible, day after day; and for this purpose temptations beyond mere amusements are often resorted to, such as drinking and gaming. So far as I have been able to discover, erections of every kind adapted to sports or having no useful end, and notori-

ously fitted up and continued with the view to make a profit for the owner, are considered in the books as nuisances. Not that the law discountenances innocent relaxation; but because it has become matter of general observation, that, when gainful establishments are allowed for their promotion, such establishments are usually perverted into nurseries of vice and crime. Common stages for rope-dancers have been adjudged nuisances at the common law; 'not only,' says Hawkins, 'because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood.' 1 Hawk. P. C., by Curwood, c. 32, Sec. 6. In the next section he distinguishes between places kept for such useless sports, and play-houses, which were originally instituted for the laudable design of recommending virtue to the imitation of the people and exposing vice and folly. These, he says, are not nuisances in their own nature; but may only become such by accident; whereas the others cannot but be nuisances. I mention common stages for rope-dancing, because bowling-alleys were long since held to stand on the same footing: Jacob Hall's Case, 1 Mod. 76 Hall, a rope-dancer had erected a stage, or was about erecting one, at Charing Cross, which the court of king's bench pronounced to be a nuisance. Hale, C. J., mentioned as a precedent, 'that in the eighth year of Charles I. Noy came into court and prayed a writ to prohibit a bowling alley erected near St. Dunstan's church, and had it.' In the report of Hall's case in 2 Keb. 846, Chief Justice Hale is represented as saying that 'Noy prayed a writ to remove a bowling-alley; and

had it, without any presentment at all.' Thus we see Hawkins sustained by the highest authority in saying that such places cannot but be nuisances. The tendency of the alley being well known, it was adjudged to be a nuisance itself; and a writ accordingly issued to remove it without any trial. Now, this is not because rope-dancing, or playing at nine-pins, or any other game with bowls is a mischief; nor that being a spectator at a rope-dance is censurable in the least. Such acts are not nuisances. In themselves they are entirely innocent. The nuisance consists in the common and gainful establishment for the purpose of sports, having the aptitude and tendency of which Hawkins speaks; not that this always produces the consequences of which he complains, but because there is imminent danger of its doing so. A deposit of gunpowder—a useful article—among a block of houses, might be very harmless; yet it is a public nuisance, from the danger of explosion: Anonymous, 12 Mod. 342. The case of the People v. Sergeant, 8 Cow. 139, is relied on, which held that a room kept for the playing of billiards was not a public nuisance, though a profit was made of it. But the court disavow the intent to interfere with the principle laid down by Hawkins. On the contrary, they refer to it with approbation, and admit that the keeping of a gaming house was an indictable offense at common law. This was held expressly in Rex v. Dixon, 10 Mod. 335. Yet the act of gaming was no more criminal by that law than dancing on a rope or playing at cricket. It may be somewhat difficult to reconcile The People v. Sergeant with the general principle which seems perfectly well settled; but the case claims no

more than that a billiard-room, appearing to be kept in a particular way, forms an exception. In general, the law is not scrupulous about actual results. It sees that a building has been erected for at least an idle purpose, the probable consequences of which will be pernicious. It does not stop, therefore, and call witnesses to prove that it is so in fact. When Hall, the rope-dancer, was brought up, Lord Hale held it enough that the stage had been or was about to be erected. He told him he understood it was a nuisance to the parish. It is true that some of the inhabitants, being present, said it occasioned broils and fightings, and drew so many rogues to the place that they lost things out of their shops every afternoon. But this information was not received as from witnesses. No one could on his oath connect the cause with the effect; and no one appears to have been sworn. All the evils complained of might have existed without the stage. Had the erection been for the purpose of *some useful business or object*, actual consequences would have been inquired of.

"*But it was the simple case of one man squandering his time for money, in order to induce others to waste both their time and money.*

"No one is so blind as not to see that such places, on their becoming known, *bring together the most profligate mixtures; brawlers, drunkards, gamblers, blacklegs, pickpockets, and other petit thieves.* Lord Hale *did not want witnesses of this. All he wanted was the fact—the testimony of experience.*"

Again on page 127 the court say:

"In the case before us, the rules of playing in Tanner's ball-alley are stated, with an instance of play by persons who hired the alley, and proceeded under the inspection and reckoning of Tanner. I have gone into a consideration of the cases, to show that a building which the law considers a nuisance in its own nature, when kept in a particular way and for a particular purpose, is not to be tested by appearances. It cannot be modified by printed rules against the practice of gambling, and by the surveillance of the owner as if to see that they are not violated. The law knows that appearances are often simulated. Vicious houses commonly make loud pretensions to such superior regularity, that however others may behave, they would be thought an exception. In the case of the ball-alley mentioned by Lord Hale, the court did not send and inquire what appearances of regularity and decency might be affected by the owner. Information that it was a bowling-alley satisfied them; and they issued a writ to abate it, without waiting for a trial. Their own sagacity spoke as to the ultimate effects. If the building had been so far well conducted, so much the better for the community. The court determined that it should not afterwards be conducted at all, on account of the consequences which would probably ensue."

Further, on page 128, the court say:

"The law does not wait for the disease to spread. It exercises a wise forecast, and repels the evil at the threshold. It does the same thing in favor of public morals and public economy. *A useless establishment,*

wasting the time of the owner, tending to fasten his own idle habits on his family, and to draw the men and boys of the neighborhood into a bad moral atmosphere—a place which, in despite of every care, will be attended by profligates, with evil communication, and at best with a waste of time and money, followed by the multiplication of paupers and rogues—has always been considered an obvious nuisance."

It certainly is not doubted that billard-halls and pool rooms are as much adverse to the peace and moral welfare of a community as are ten-pin alleys, and the court in the last case dwell on the fact that the place was kept for hire, holding that under such circumstances, the owner having but one object—that of profit—would permit all classes of persons to congregate there.

Cooley's Constitutional Limitations, 7th Edition, page 884:

> "The state has also a right to determine what employments shall be permitted *and to forbid those which are deemed prejudicial to the public good."*

In any classification of the public billiard hall and pool room business with other businesses, for purposes of the exercise of the police power, it should and must necessarily be classified with the saloon business, for when it has been decided to regulate, instead of prohibit, we know of no businesses which are so similarly regulated. In fact, the usual regulations are the same for both such

as—preventing minors to enter the place where such business is conducted, requiring such places to close at a certain hour in the evening, etc. As a legal proposition, there is no question but that the saloon business can be prohibited. Yet, we can just as well imagine how the saloon business could be regulated so that it would not cause drunkenness, so that it would not harbor the vicious, so that somehow it would not do what it does do, as to imagine the successful carrying out of the same sort of scheme that counsel for plaintiff in error have heretofore recommended for the public pool and billiard business.

Billiard halls and pool rooms are in the same class with saloons, for the reason that they attract the same kind of customers, they encourage gambling, they provide loafing places for the idle, vicious and criminal, and altogether form places highly injurious to the moral welfare of the community.

Therefore, in the light of the numerous decisions of this court, and of the courts of the State of California, and of other states, we must insist that if a business tends to injure the public health, weaken the public morals, or disturb the public peace such business may be regulated or absolutely prohibited, in the discretion of the legislative body. In view of these decisions, many salutary laws have been passed, which have been the means of protecting and upbuilding society.

By reason of this tendency to endanger public morals the pool room business is generally unlawful. Any business is unlawful that has such a tendency. The saloon business is said to be unlawful, by reason of the fact that it so frequently makes drunkards of its customers.

There are quite a few businesses that generally are perfectly lawful, but by reason of their endangering the public welfare are made unlawful. The matter of the slaughtering of animals or the maintaining of slaughter houses within the corporate limits has in some cities been made unlawful by ordinance and such ordinances have been upheld by the courts, as in the cases of *Ex parte* Shrader, 33 Cal. 279, and *Ex parte* Heilbron, 65 Cal. 609.

It is well known that all sorts of schemes are devised in the public billiard hall and pool room to make the games interesting; such as requiring the loser to pay the table fees, the loser paying for the cigars, betting on the game. All such schemes have been declared by the courts to be gambling.

In the case of Hall v. State, 34 S. W. Rep. 22, under the Texas statute prohibiting the exhibition of gaming tables therein, it was an offense to run a pool table where the loser in each instance paid the table fees, the court holding that this would constitute a betting. In the case of Webb v. State, 17 Texas Appeals 205, under a statute prohibiting gaming, the keeping of a billiard or

pool table whereon was played the game of fifteen-ball pool, and where the loser was to pay for the cigars, it was held that such proof was ample to sustain a conviction of exhibiting a gaming table. It is held in the case of State v. Jackson, 39 Mo. 420, that betting money or property upon the game called pool is within the prohibition of the law against gaming.

It is a well known fact, proven by the testimony of experience, that gambling, to a greater or less extent, prevails in all pool rooms. Under the common law, it was held that "to keep a common gaming house is a common nuisance, and a misdemeanor to the common law, because of its tendency to *encourage idleness and breach of the peace.*" Rex v. Hall, 2 Keb. 846.

Billiard halls and pool rooms, being in the same class with saloons, and gambling houses, have a tendency to degrade the public morals, and not being a beneficial business or occupation, they have no inherent or constitutional right to exist at all.

All property is held subject to the police power. The fact that expenditures were made prior to the passage of the law does not avail anything. In this connection we cite the following:

Odd Fellows Cemetery Assn. v. San Francisco, 140 Cal. 226;

Fertilizing Co. v. Hyde Park, 97 U. S. 659;

Mugler v. Kansas, 123 U S. 669;
Crowley v. Christensen, 137 U. S. 87;
Cooley's Constitutional Limitations, 6th Ed. 705.

In case of City of Corinth v. Crittenden, 94 Miss. 41, the court says:

> "While the general law provided for the licensing of pool rooms, such a business comes well within the police power of a state both to regulate or prohibit. The evil tendency of such places is known to all mankind. In them no good is promoted, but they too often prove to be the nurseries of idleness and such evils as naturally result therefrom. The keeping of a pool room or a billiard room can be considered a lawful business only so long as the legislature makes it so, and only in such places as the law allows. Such places may be prohibited at any time the legislature deems it proper to do so, and the influence of such places is not much less corrupting than is that of a dramshop."

In case of Booth v. Illinois, 184 U. S. 425, Mr. Justice Harlan, delivering the opinion of the court, said (page 429):

> "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the

courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

III.

A Broad Distinction Is Recognized Between Useful and Non-useful Businesses in the Exercise of the Police Power by Municipalities, and the Billiard and Pool Room Business Is Not a Useful Business.

This distinction is recognized by many authorities.

Freund, in his work on The Police Power, at section 59, says:

> "The correct constitutional principle seems to be that a business serving valuable economic or social purposes may not be entirely prohibited, because it is attended with danger or liable to abuse, *but that the policy of prohibition may be sustained, if the business exists only for the gratification of pleasure, or has otherwise no legitimate function.*"

In the case of Crowley v. Christensen, 137 U. S. 86, Justice Field in reviewing the case of Yick Wo v. Hopkins, 118 U. S. 356, says in his decision on an appeal from an order of discharge on *habeas corpus* where petitioner had been arrested

for violating a liquor ordinance of the city of San Francisco:

> "It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid based uncontrolled discretion in the board of supervisors with reference to a business and harmless in itself to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may provide.
>
> "There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of the United States, *as it is a business attended with danger to the community*. It may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests with the discretion of the governing authority. The authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state."

When plaintiff in error was before the District Court of Appeals of the Second District of the state of California, on a writ of *habeas corpus,* growing out of the case at bar (*Ex parte* Murphy, 8 Cal. App. Rep. 440, 97 Pac. Rep. 199), that court in deciding the matter said:

> "The question of the reasonableness of ordinances regulating the conduct of such business (referring to laundries, tanneries, etc.), and excluding their operation from or confining it to certain prescribed limits, as well as the uniform operation of the same, is always a proper subject for judicial inquiry. Such avocations being necessary and useful, the citizen under proper restrictions has a fundamental right to engage therein. (*Ex parte* Drexel, 147 Cal. 763.) *When dealing with a non-useful calling, the power of the municipality is much broader. The citizen possesses no inherent right to conduct for profit a public place intended purely for the amusement of its patrons, the tendency of which is immoral or vicious.*"

The public billiard and pool room business is not a useful business.

Referring to the case of Goytino v. McAleer *et al., supra,* the court in that case say:

> *"The business of conducting a pool table cannot be said to be a useful employment or business."*

In the case of City of Tarkio v. Cook, 120 Mo. 1, it was held that:

> *"Keepers of billiard tables are not recognized by the state as exercising a useful occupation."*

The late Judge Smith of the Superior Court of Los Angeles county, state of California, when plaintiff in error was before him on a writ of *habeas corpus,* growing out of the case at bar, in his opinion remanding petitioner to the custody of the city marshal of the city of South Pasadena, said:

> "*But we have seen that the conducting of a pool room is not a useful occupation,* and does not come within the purview of any of the authorities quoted by petitioner upon his proposition. The law is well settled in this state, as has been shown by the authorities already cited, that where a business is not a useful occupation, such as conducting a saloon, and any kindred places, the Supreme Court has always upheld the power that has been vested in a board or in a person to say whether such person shall have a license or no, consequently the many authorities cited by petitioner have to do with lawful and useful businesses, such as referred to in the Yick Wo case, which was a laundry case; State v. Mahnard, 9 S. W. Rep. 480, which was a dairy case, and other cases of similar character; consequently there is no application to this case."

If the municipality can prohibit useful occupations, and be sustained by the court in doing so, as was the case in *Ex parte* Shrader, 33 Cal. 279, and *Ex parte* Heilbron, 65 Cal. 609, with how much more reason can it prohibit a non-useful and harmful occupation.

It is our contention that as to the necessity and reasonableness of an ordinance regulating or pro-

hibiting a business, the true rule is laid down by the Supreme Court of the state of California in the decisions of that court as follows:

> "A competent legislative body has passed upon the question of fact involved, and we cannot go behind the finding. So far as we can know on this record, the power conferred has been exercised intelligently and in good faith." (*Ex parte* Shrader, 33 Cal. 279.)
>
> "The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the law-making body." (*Ex parte* Tuttle, 91 Cal. 589.)
>
> "Except where the court can see, in the light of facts properly brought to its knowledge, that a given police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to preserve or protect the public safety, health, comfort, or morals, the decision of the legislative body as to the necessity or reasonableness of the regulation, is conclusive." (Odd Fellows Cemetery Ass'n v San Francisco, 140 Cal. 226.)

To the same effect see:

> Goytino v. McAleer *et al.*, 88 Pac. Rep. 991.

This is the position of the court in Munn v. Illinois, 94 U. S. 113, where the court say:

> "For our purposes we must assume that if a state of facts could exist that would justify such legislation it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of

> expediency. If no state of circumstances could exist to justify such a statute then we may declare this one void because in excess of the legislative power of the state, but if it could we must presume it did. *Of the propriety of legislative interference within the scope of the legislative power the legislature is the exclusive judge.*"

In applying this ruling in the case of *In re* Smith, 143 Cal. 368, the Supreme Court of California, at page 371, makes this qualification:

> "But running current with this principle, and to be read with it, is one of equal importance,—namely, that when the police power is exerted to regulate *a useful business or occupation*, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or vocation *which in itself is recognized as innocent and useful to the community.*"

But the qualification made in the case of *In re* Smith, *supra*, applies to useful businesses, and does not apply to non-useful businesses such as public billiard halls and pool rooms.

So that, in the regulation or prohibition of a non-useful business, such as the public billiard and pool room business, the rule as laid down in the said cases of *Ex parte* Shrader, *Ex parte* Tuttle, Odd Fellows Cemetery Association *et al.* v. San Francisco *et al.*, Goytino v. McAleer and Munn v. Illinois, applies, and the decision of the legislative body as to the necessity and reason-

ableness of the ordinance is conclusive, the legislative body being the exclusive judge as to the wisdom and expediency of the law in such cases.

IV.

THE ORDINANCE PROHIBITS THE PUBLIC POOL AND BILLIARD BUSINESS, MAKING NO EXCEPTIONS, HENCE IT IS NOT DISCRIMINATIVE OR CLASS LEGISLATION.

The intent and purpose of the ordinance, as is apparent on its face, is not directed at persons, but at places and the business. Nor is it directed at any business other than the billiard and pool room business. Any person may bring himself under the provisions of the ordinance, in reference to a permit. In very familiar instances of like regulation where the sale of intoxicating liquors is prohibited, but providing that permits may be issued to hotels to serve liquors with meals, these ordinances are invariably upheld by the courts. A provision in an ordinance providing for a permit to hotel keepers to serve liquors, with their meals, does not, by such provision, provide for the granting of a permit for a saloon, and no one doubts the constitutionality of such ordinances.

By the provisions of the ordinance in this case, no person can engage in the pool and billiard business in the city of South Pasadena, it matters not who such person is or what other occupation he

may follow. The ordinance prohibits the billiard and pool room business.

The ordinance does not prevent anyone from playing at the game of pool or billiards, but it does prohibit the public pool and billiard hall.

> *"If the governing power can prohibit the thing altogether, it can impose such conditions upon its existence as it pleases."*

In the case of *Ex parte* Christensen, 85 Cal., page 208, the petitioner had been arrested for carrying on a retail liquor business in the city of San Francisco without a license, and one of his contentions was that the ordinance prescribing a license was void, for the reason that it was in violation of the provisions of the federal constitution, and he based his contention upon the fact that the issuance of the license was made to depend upon the permission of a majority of a board of police commissioners, but if that could not be obtained, upon the approval of twelve property owners in the block in which the business was to be carried on, and his objection was that such provision made the license depend upon the arbitrary will and pleasure of the board of police commissioners in the first instance, and of the twelve property owners in the second, and among other cases cited the case of Yick Wo v. Hopkins, 118 U. S. 356. The court passing upon the matter used the following language, found on page 213:

"But whatever force this objection might have in reference to license to carry on *the ordinary avocations of life, which are not supposed to have any injurious tendency*, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. (See Mugler v. Kan., 123 U. S. 623.) *And if the governing power can prohibit the thing altogether, it can impose such conditions upon its existence as it pleases.*"

The District Court of Appeal, Second District, state of California, in remanding petitioner to custody of the city marshal of South Pasadena under a writ of *habeas corpus*, above referred to, said (8 Cal. App. Rep. 440; 97 Pac. Rep. 199):

"Petitioner insists that the ordinance is obnoxious by reason of its being special and class legislation, in that its provisions do not apply to the proprietors of hotels having twenty-five or more furnished bedrooms and using a general register for guests. There is no merit in this contention. *The ordinance is directed at those persons who keep billiard halls and poolrooms for hire or public use, and its provisions apply to all alike falling within this class. It prohibits every one from engaging in such business. The provisions do not apply to the individual who keeps a pool table in his house for the use of himself and guests, nor to the hotel-keeper who maintains tables for use of bona fide guests only. In neither case can it be said to be public, nor that it creates in either a monopoly of the business. All are alike amenable*

to the law prohibiting them from conducting such place for hire or public use.

"Even accepting petitioner's theory as to the effect and operation of the ordinance, there is no force in the objection. As we have seen the city may prohibit altogether, 'and if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases.' (*Ex parte* Christensen, 85 Cal. 208.) And, as said in *Ex parte* Kidd, 4 Cal. App. Dec. 290: 'Let the correctness of his (petitioner's) conclusions be assumed, and we have a case where the law-making power is regulating a business the tendency of which is injurious to the public morals, safety and welfare.' *It is for the legislative body to determine whether the business shall exist at all, and, if so, under what restrictions.* It is quite apparent that keeping billiard and pool tables in a hotel for the exclusive use of its guests would be to a very great extent, if not altogether, free from the resultant evils and vicious tendencies connected with the public poolroom. If there be a diversity in such legislation, this fact suggests a rational reason for such classification. Counsel for petitioner has cited many authorities in support of his contention. These citations, almost without exception, relate to the operation of laws licensing or regulating the conduct of the ordinary and useful avocations of life; that is, those the conduct of which is not recognized as having injurious tendencies. Such cases are wholly inapplicable to the case at bar, for the reason that the inherent and fundamental right of a citizen to conduct the business in the one class of cases is wholly wanting in the other. In the case of *In re* Zhizhuzza, 147 Cal. 328, Mr. Justice Van Dyke, in dis-

cussing the uniform operation of laws, said: 'There is no constitutional provision which expressly requires the uniform operation of municipal ordinances. Nevertheless, where they unjustly discriminate they are sometimes declared unreasonable and therefore void. A law is general which applies to all of a class—the classification being a proper one, and the requirement of the constitutional provision in question is satisfied if it applies to all the class alike. The word "uniform" in the constitution does not mean universal. The section intends simply that the effect of the general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same.' In addition to the cases already cited, see Sonora v. Curtin, 137 Cal. 583; California Reduction Co. v. Sanitary Reduction Works, 126 Fed. Rep. 29; *Ex parte* Koser, 60 Cal. 177; *Ex parte* Drexel, 147 Cal. 763; Crowley v. Christensen, 137 U. S. 86.

"That portion of the ordinance relating to hotels keeping billiard and pool tables provides that the board of trustees may, in its discretion, grant permits therefor to such hotels. It is contended that the ordinance is void by reason of the fact that it vests an arbitrary power in the board. *Conceding this to be true, nevertheless, since the governing power can prohibit altogether, it may impose any restrictions deemed proper and necessary as a condition of granting permits to conduct such business.*" * * * "Moreover, petitioner does not bring himself within the class who could be affected by the exercise of such arbitrary discretion, and hence is not affected thereby. (*Ex parte* Kidd, *supra.*)"

When plaintiff in error was before the Supreme Court of the state of California on his application for a writ of *habeas corpus* growing out of the case at bar that court held as follows:

> "The facts in this case are fully stated in an opinion of the District Court of Appeal for the Second Appellate District, filed in denying petitioner's application for a writ of *habeas corpus*. (See 8 Cal. App. 440, (97 Pac. 190).) Our investigations have satisfied us that such opinion correctly states the law applicable on the various claims made by petitioner against the validity of the municipal ordinance for a violation of which he is being prosecuted, and it is unnecessary for us to add thereto in disposing of this proceeding."
>
> *In re* J. L. Murphy, on Habeas Corpus, 155 Cal. 322.

In remanding petitioner to the custody of the city marshal of city of South Pasadena on a writ of *habeas corpus*, above referred to, the late Judge Smith of the Superior Court of Los Angeles county, California, said:

> "There is no merit in the contention that because the ordinance permits hotels of a certain class to have billiard or pool tables for the use of their guests only, that, therefore it is discriminative and does not grant equal right to all parties. The ordinance is directed against public places where billiard or pool halls are conducted; the exception has to do only with a certain class of hotels, but they are only for the use of their guests, and not as a public pool room or billiard hall. The

> public are not permitted to go into such places and play pool or billiards. So that, section 21 of article 1, which provides, 'Nor shall any citizen or class of citizens be granted privileges or immunity, which upon the same terms shall not be granted to all citizens,' does not apply in this case, because all citizens who are in the same situation as the hotel keepers, in said ordinance named, can have the same privilege, and it is not a discrimination within the meaning of said section 21."

In the case of *Ex parte* Koser, 60 Cal. 177, the petitioner was convicted of violating sections 300 and 301 of the Penal Code of the state of California, by keeping open his saloon on Sunday, said section 300 provided against the keeping open on Sunday of any store, workshop, bar, saloon, banking house, or any place of business, for the purpose of transacting business therein. Said section 301 provided that section 300 did not apply to persons keeping open hotels, boarding-houses, barber shops, baths, markets, restaurants, taverns, livery stables or retail drug stores, on Sunday for the legitimate business of each, or such manufacturing establishments as are usually kept in continuing operation. These sections were attacked by petitioner on the ground that they were a direct violation of the constitution of this state, providing against the passage of special laws and against the passage of special privileges or immunities, and it was held that:

"The offense defined in the sections of the code above quoted is of the class *mala prohibita*. Independent of statute, it is not an offense, and the legislature in making the section was merely adding to the class of public offenses which it deemed expedient should be prohibited by statute. In making the exception in 301, it merely declared that in its judgment, there was something in the nature of the callings specified in such section, which rendered it improper to include them within the act. The exclusion made by section 301 was not arbitrary and the discrimination was reasonable. It was very easy to perceive that there are features in the character of the callings referred to in section 301, and in their relation to the community in which they exist, which render such exclusion proper, and one upon which the legislature might wisely exercise its judgment in leaving them unaffected by penal enactment. Certainly, the legislature is intrusted with an enlarged discretion to determine what shall be punished criminally and what shall not be, to fix upon what shall be put in the class of *mala prohibita*, and what shall not be included.

"It is consistent with this view, to conclude and hold that such a law is a general one, uniform in its operation, and that by it no privilege or immunity is granted so as to bring it in conflict with the clause of the constitution above referred to."

Counsel for plaintiff in error complain that the ordinance vests an arbitrary power in the legislative body, and that for that reason the ordinance should not be upheld.

This was the very contention made by counsel for petitioner in the case of Goytino v. McAleer, 88 Pac. Rep. 991, and in passing upon the same the court held as follows:

> "Petitioner further claims that the ordinance is invalid because it vests an undefined and unrestricted discretion in a board. This cannot well be said of an ordinance which contemplates an exercise of discretion only after determining certain facts upon which their judgment is based, for all regulations and rules of the board authorized by the ordinance are required to be directed to questions of public safety, health, and morals. The power to exercise the discretion reposed in the board by the ordinance is uniform as to all persons who may apply for a license to engage in that particular business, and it is the effect of that business in the locality which determines its tendency as affecting the subjects of police regulation. It needs no argument to establish the proposition that a public place of amusement, or any other place conducted as an inducement for the assemblage of a crowd of people, may be kept or maintained in certain localities under such circumstances as to render the same dangerous to the public safety. The safety of the people is the supreme law and justifies legislation pertaining to the public welfare, health, and morals.
>
> "*Ex parte* Drexel, 147 Cal. 766, 82 Pac. 429; 2 L. R. A. (N. S.) 588. The city council of Los Angeles by its charter has full power to pass ordinances upon any subject of municipal control. The board of police commissioners have such power as is granted or imposed by ordinance." * * * "In addition to this, the other sections of the ordi-

> nance, which denounce the issuance of a license without permission therefor shall first be given by the board of police commissioners, contemplate an inquiry by the board as to the character of the permit; for it would be an idle thing to say that a board should issue a permit were they given no power to determine the circumstances and necessities of the case where the permit was claimed." * * * "Holding as we do the right of the city under the charter to enact the ordinance under consideration, *a court will not interfere with the discretion reposed in a proper board or tribunal, but will assume that official duty has been properly and lawfully performed, in the absence of positive proof to the contrary.*"

The People *Ex rel.* August Schwab, appellant, v. Hugh J. Grant, Mayor, etc., respondent, 126 N. Y. 473. This appeal was brought by the relator to "procure reversal of an order of the general term affirming an order of the special term which refused to grant an alternative mandamus against the mayor, requiring him to approve the relator's bond and issue to the relator a license as auctioneer in the city of New York, or show cause to the contrary." No question was made as to the relator complying with the law in his application for a license, but it was claimed that the mayor had, in the exercise of his discretion, the right to deny the application and refuse the license. It was contended by relator that he was entitled as matter of right to a license on having complied with the law in making his application.

The court on page 482 say:

> "A determination of this appeal, which would have the effect of denying the mayor's discretion in the exercise of the power conferred by these provisions, would, we think, be most unwise and impolitic and subversive of the policy of the charter, as well as the best interests of the municipality where it is exercised. The practice of nearly a century in this state has taught us that there is little to fear from an abuse of this power, for during that time we have yet to learn of an instance where it has been perverted for improper purposes, or excited public condemnation or disapproval. *In the government of the affairs of a great municipality, many powers must necessarily be confided to the discretion of its administrative officers, and it can be productive only of mischief in the treatment of such questions, to substitute the discretion of strangers to the power in place of that of the officers best acquainted with the necessities of the case and to whom the legislature has specially confided their exercise.*"

The Supreme Court of California again discusses this point in the case of City of Sonora v. Curtain, 137 Cal., at page 587, and say:

> *"The means needful or appropriate to be taken by the legislative body of a municipality in the exercise of its police powers are largely left to the judgment and discretion of such body. In such case a wide discretion is necessarily vested in the legislative body, and courts will only interfere in a clear case, when the ordinance or statute has no real or substantial relation to those objects and the*

fundamental rights of the citizen are assailed under the guise of a police regulation."

As to what is left to the discretion of the legislative body was quite clearly set forth in the case of the California Reduction Co v. Sanitary Reduction Works, 126 Fed. Rep. 29, at page 35:

"The power to make the law necessarily carries with it the power to judge of its necessity, expediency, and justice, and, primarily at least, of the reasonableness of the means and methods used to accomplish the end sought to be obtained. Courts have nothing to do with the wisdom, policy, or expediency of the law. The courts are only authorized to deal with the question of the power of the legislature or municipality to pass the laws or orders in question, and determine whether they are valid, and, if so, to construe their provisions. There their duty ends. These general principles are axiomatic in the jurisprudence of this country."

In the case of Otis v. Parker, 187 U. S. 606, Mr. Justice Holmes delivering the opinion of the court said (page 608):

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relative-

> ly fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*
>
> "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect."

But, assuming that the legislative body were to regulate instead of prohibit the business by confining it to certain place or places, yet under the decisions of the courts that would not be held as discriminative or class legislation, for in the case of *Ex parte* Tuttle, *supra*, where the petitioner was under arrest upon a charge of violating an ordinance of the city of San Francisco, which prohibited "selling of pools on horse races or holding money or other thing as a stake upon any wager as the result of such race, except within the enclosure of a race track where such trial or contest is to take place." On page 590, the Supreme Court of California says:

> "It is claimed by the petitioner that the ordinance is void for the reason that it, in effect, gives to the proprietor of the race-course the right to determine who shall enjoy the privilege of indulging in this species

of betting, as he has the power to admit and exclude whom he pleases, and only those admitted to the track are permitted to wager upon the result of the race; and further, that a monopoly is created in favor of such proprietor, as those who desire to engage in the business of pool-selling will necessarily be compelled to pay him for the privilege.

"We do not think these objections have sufficient force to render the ordinance invalid."

And on pages 591 and 592:

"Whatever may be its incidental effect, it is apparent that it is not the object or purpose of the ordinance to confer any special privilege or benefit upon those who own or control race-courses, by giving them the exclusive right to carry on the business, or of selling to others the privilege of pool-selling on horse-races; and therefore we need not stop to consider whether a law or ordinance having only such an effect, or plainly intended to accomplish such an object, under the mere pretense of establishing a police regulation, could be upheld. As already stated, a large discretion is vested in the legislative branch of the municipal government in dealing with questions of this character, in determining not only what games or wagers should be made the subject of legislation, but if permitted at all under what regulations they should be allowed to exist."

The case of State v. Thompson, 160 Mo. 333, is exactly similar to said case of *Ex parte* Tuttle, 91 Cal. 589. The legislature of the state of Missouri enacted a law prohibiting book making and

pool selling at all places, except upon race courses and fair grounds where the races were to be run, and the races could be run only upon procurement of a license from the state auditor, and it was objected by petitioner that the act constituted class legislation, in answer to which the court used the following language:

> "So in the case at bar, the law 'embraces all persons alike who choose to place themselves within its reach,' and is not therefore vicious class legislation, either as to persons or places."

The court cite the case of *Ex parte* Tuttle, *supra*, with approval.

We wish to again state that the billiard and pool room business is absolutely prohibited by said ordinance; that as to the use of billiard and pool tables in hotels, the ordinance provides a certain regulation, which regulation prevents such hotels from doing a public billiard and pool room business, as such tables are to be used by guests only; that as to this regulation it is also fully within the powers of the legislative body. In the case of Goytino v. McAleer *et al.*, *supra*, the discretion of the board of police commissioners was exercised over the business and as we have seen the court held the ordinance conferring such power valid.

It is generally recognized that in the exercise of the police power by municipalities the general

welfare is more highly subserved by a large freedom in legislative action. This has been very clearly expressed by the Supreme Court of California in the following cases:

In re Kelso, 147 Cal. 609, at page 612:

> *"Whether or not a certain limitation or regulation is essential is largely a question for the legislative department, to be determined with reference to all the existing circumstances, and the courts will not ordinarily interfere where it can be seen that the regulation has some proper relation to an object within the domain of the police power of the state, which as stated by Mr. Cooley, includes all regulations having reference to the comfort, safety or welfare of society."*

Ex parte Haskell, 112 Cal. 412, at page 416:

> "It is urged, in effect, that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. But we are unable to regard it as open to either or any of these objections. A municipal ordinance must be very clearly obnoxious to such objections as those made, or some of them, before it will be declared invalid by the courts. *Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of*

the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof."

In view of the foregoing authorities, and for the reasons hereinbefore stated, we respectfully submit that the ordinance here under consideration is constitutional and valid.

Respectfully submitted,

LYNN HELM,

JOHN E. CARSON,

Attorneys for Defendant in Error.

MURPHY *v.* PEOPLE OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA.

No. 204. Argued March 11, 1912.—Decided June 7, 1912.

While the Fourteenth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent legislation intended to regulate useful occupations, which because of their nature and location, may prove injurious or offensive to the public.

The Fourteenth Amendment does not prevent a municipality from prohibiting any business which is inherently vicious and harmful.

The Fourteenth Amendment does not prevent a State from regulating or prohibiting a non-useful occupation which may become harmful to the public, and the regulation or prohibition need not be postponed until the evil is flagrant.

An ordinance prohibiting the keeping of billiard halls is not unconstitutional under the Fourteenth Amendment, either as depriving the owner of the hall of his property without due process of law or as denying him the equal protection of the laws.

Where, in the exercise of the police power, the municipal authorities by ordinance determine that a certain class of resorts should be prohibited as harmful to the public, the courts cannot except from the operation of the statute one of the class affected on the ground that his particular place does not produce the evil aimed at by the ordinance.

One cannot be heard to complain of his money loss by reason of the legislating out of existence of a business in which he had invested and which is not protected by the Federal or state constitution and which he knew was subject to police regulation or prohibition.

A classification in a statute regulating billiard halls based on hotels having twenty-five rooms is reasonable; and the owner of a billiard hall, not connected with a hotel, is not denied equal protection of the laws by an ordinance prohibiting keeping billiard halls for hire because hotels having twenty-five rooms can maintain a billiard hall for their regular guests.

One who does not keep a hotel with less than the specified number of rooms, cannot be heard to complain that a statute denies the owners of the smaller hotels the equal protection of the laws, it not appearing that the provision was inserted for purposes of evasion or that the ordinance was unequally enforced.

The fact that one of a class excepted from the operation of a police ordinance on complying with a condition, does not comply therewith, does not render the statute unconstitutional as against the classes upon which it operates, but renders the person violating the condition subject to the penalties of the ordinance.

The ordinance of South Pasadena, California, passed in pursuance of police power conferred by the general law of the State, prohibiting the keeping of billiard halls for hire, except in the case of hotels having twenty-five rooms or more for use of regular guests, is not unconstitutional under the Fourteenth Amendment either as depriving the owners of billiard halls not connected with hotels of their property without due process of law, or as denying them equal protection of the laws.

155 California, 322, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a police law of California regulating billiard halls, are stated in the opinion.

Mr. Alfred S. Austrian, with whom *Mr. Levy Mayer* was on the brief, for plaintiff in error:

The police power may be exercised to protect the public health, morals, safety and the general welfare, but it is at all times subject to the constitutional limitations that it may not arbitrarily take away the lawful rights of a citizen. *Lawton* v. *Steele*, 152 U. S. 133, 137; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Yick Wo* v. *Hopkins*,

118 U. S. 356; *C., B. & Q. R. R.* v. *Illinois*, 200 U. S. 561, 592, 593.

Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative, question. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 235; *Mugler* v. *Kansas*, 123 U. S. 622, 661; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 154; *Lochner* v. *New York*, 198 U. S. 45, 60.

If a business may be so conducted as to be harmful to the public welfare, but is not necessarily so, the legislature, under its police power, may regulate, but cannot prohibit, such business. Cases *supra; State* v. *Hall*, 32 N. J. L. 158, 159; *Pfingst* v. *Senn*, 94 Kentucky, 556; *S. C.*, 23 S. W. Rep. 358; *State* v. *McMonies*, 75 Nebraska, 443; *S. C.*, 106 N. W. Rep. 454; *Zanone* v. *Mound City*, 103 Illinois, 552, 558.

If a thing is not in fact a nuisance *per se* it cannot be made so by a mere declaration of the legislative will expressed in an ordinance. *Yates* v. *Milwaukee*, 10 Wall. 497, 505; *Boyd* v. *Board*, 117 Kentucky, 199; *S. C.*, 77 S. W. Rep. 669; *Board* v. *Norman*, 51 La. Ann. 736; *S. C.*, 25 So. Rep. 401; *Hume* v. *Cemetery*, 142 Fed. Rep. 552, 565.

A billiard and pool room is not a nuisance *per se;* it is not necessarily harmful to the public welfare. *State* v. *McMonies*, 75 Nebraska, 443; *Ex parte Murphy*, 8 Cal. App. 440; *Ex parte Meyers*, 7 Cal. App. 528; *Pfingst* v. *Senn*, 94 Kentucky, 556; *State* v. *Hall*, 32 N. J. L. 158, 159; *Breninger* v. *Belvidere*, 44 N. J. L. 350; *Morgan* v. *State*, 64 Nebraska, 369.

Even if an ordinance prohibiting all billiard and pool rooms were valid, this ordinance is unconstitutional in that it confers privileges and immunities on some citizens which it denies to others and the distinctions and classification sought to be drawn are arbitrary, are not based on natural grounds of reasonableness or public policy

and do not tend to promote the public welfare. *L. S. & M. S. R. R.* v. *Smith*, 173 U. S. 684; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558, 563; *Cotting* v. *Godard*, 183 U. S. 79, 112; *Re Yot Yot Sang*, 75 Fed. Rep. 983; *Nichols* v. *Watter*, 37 Minnesota, 264, 271; *McCue* v. *Sheriff*, 48 Minnesota, 236; *Lappin* v. *District of Columbia*, 22 App. D. C. 68, 78; *Fiscal Court* v. *Cox Co.*, 132 Kentucky, 738; *Bailey* v. *People*, 190 Illinois, 28, 37; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *G., C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, 155, 159, 165; *People* v. *Warden*, 157 N. Y. 116; *Boyd* v. *Board*, 117 Kentucky, 199.

Mr. John E. Carson, with whom *Mr. Lynn Helm* was on the brief, for defendant in error:

Municipalities in the State of California, in the exercise of the police power conferred upon them by § 11, Art. XI of the state constitution, may either regulate or prohibit, and under such power they may prohibit a thing which is not a nuisance *per se*. *Cemetery Ass'n* v. *San Francisco*, 140 California, 226; *Ex parte Murphy*, 8 Cal. App. 440; *S. C.*, 97 Pac. Rep. 199; *Ex parte Lacey*, 108 California, 326.

The conducting and keep of billiard and pool rooms for hire or public use is a constant menace to the public peace and morals and they may be regulated by control and regulation or entirely prohibited. *Goytino* v. *McAleer*, 88 Pac. Rep. 991; *Ex parte Myers*, 6 Cal. App. 273; *Ex parte Murphy, supra; City of Tarkio* v. *Cook*, 120 Missouri, 1; *Ex parte Shrader*, 33 California, 279; *Ex parte Tuttle*, 91 California, 589; *Cemetery Ass'n* v. *San Francisco*, 140 California, 226; *Clearwater* v. *Bowman*, 72 Kansas, 92; *State* v. *Thompson*, 160 Missouri, 333; *Tanner* v. *Albion*, 5 Hill (N. Y.), 121; Cooley's Const. Lim. (7th ed.) 884; *Hall* v. *State*, 34 S. W. Rep. 22; *Webb* v. *State*, 17 Tex. App. 205; *State* v. *Jackson*, 39 Missouri, 420; *Rex* v. *Hall*, 2 Keb. 846; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Mugler* v. *Kansas*, 123 U. S. 669; *Crowley* v. *Christensen*,

137 U. S. 87; *Booth* v. *Illinois*, 184 U. S. 425; *Corinth* v. *Crittenden*, 94 Mississippi, 41.

A broad distinction is recognized between useful and non-useful businesses in the exercise of the police power by municipalities, and the billiard and pool room business is not a useful one. Freund on Police Power, § 59; *Crowley* v. *Christensen*, 137 U. S. 86; *Ex parte Murphy*, 8 Cal. App. 440; *Goytino* v. *McAleer*, 88 Pac. Rep. 991; *Tarkio* v. *Cook*, 120 Missouri, 1; *Ex parte Shrader*, 33 California, 279; *Ex parte Tuttle*, 91 California, 589; *Cemetery Ass'n* v. *San Francisco*, 140 California, 226; *Munn* v. *Illinois*, 94 U. S. 113; *In re Smith*, 143 California, 368.

The ordinance prohibits the public pool and billiard business, making no exceptions, and it is therefore not discriminative nor class legislation. Cases *supra*, and *Ex parte Christensen*, 85 California, 208; *In re Murphy*, 155 California, 322; *Ex parte Koser*, 60 California, 177; *Schwab* v. *Grant*, 126 N. Y. 473; *Sonora* v. *Curtain*, 137 California, 587; *California Reduction Co.* v. *Sanitary Works*, 126 Fed. Rep. 29; *Otis* v. *Parker*, 187 U. S. 606; *In re Kelso*, 147 California, 609; *Ex parte Haskell*, 112 California, 412.

MR. JUSTICE LAMAR delivered the opinion of the court.

In 1908 the city of South Pasadena, California, in pursuance of police power conferred by general law, passed an ordinance which prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public use, provided it should not be construed to prevent the proprietor of a hotel using a general register for guests, and having twenty-five bedrooms and upwards, from maintaining billiard tables for the use of regular guests only of such hotel, in a room provided for that purpose.

The plaintiff in error was arrested on the charge of

violating this ordinance. His application for a writ of *habeas corpus* was denied by the Court of Appeals and Supreme Court of the State. *In re Murphy*, 8 Cal. App. 440; 155 California, 322. Thereafter the case came on for trial in the Recorder's Court, where the defendant testified that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipments; that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted, and "that there was nothing in the conduct of the business which had any tendency to immorality or could in the least affect the health, comfort, safety or morality of the community or those who frequented said place of business." This evidence was, on motion, excluded and testimony of other witnesses to the same effect was rejected.

The defendant was found guilty and sentenced to pay a fine, or in default thereof to be imprisoned in the county jail. The conviction was affirmed by the Superior Court of the County, the highest court to which he could appeal. The case was then brought here by writ of error, the plaintiff contending that the ordinance violated the provisions of the Fourteenth Amendment, claiming, in the first place, that in preventing him from maintaining a billiard hall it deprived him of the right to follow an occupation that is not a nuisance *per se*, and which therefore could not be absolutely prohibited.

The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the

useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiff's application for *habeas corpus*, a nuisance *per se*. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game but at the place; and where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go behind their finding and inquire into local conditions; or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance. As said in *Booth* v. *Illinois*, 184 U. S. 425, 429:

"A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily at-

tend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. *Tanner* v. *Albion*, 5 Hill. 121; *City of Tarkio* v. *Cook*, 120 Missouri, 1; *City of Clearwater* v. *Bowman*, 72 Kansas, 92; *City of Corinth* v. *Crittenden*, 94 Mississippi, 41; *Cole* v. *Village of Culbertson*, 86 Nebraska, 160; *Ex parte Jones*, 97 Pac. Rep. 570.

Indeed, such regulations furnish early instances of the exercise of the police power by cities. For Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places.

Under the laws of the State, South Pasadena was authorized to pass this ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain of the money loss resulting from having invested his property in an occupation which was neither protected by the state nor the Federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

There is no merit in the contention that he was denied the equal protection of the law because, while he was prevented from so doing, the owners of a certain class of hotels were permitted to keep a room in which guests might play at the game. If, as argued, there is no reasonable basis for making a distinction between hotels with 25 rooms and those with 24 rooms or less, the plaintiff

in error is not in position to complain, because not being the owner of one of the smaller sort, he does not suffer from the alleged discrimination.

There is no contention that these provisions, permitting hotels to maintain a room in which their regular and registered guests might play were evasively inserted, as a means of permitting the proprietors to keep tables for hire. Neither is it claimed that the ordinance is being unequally enforced. On the contrary, the city trustees are bound to revoke the permit granted to hotels in case it should be made to appear that the proprietor suffered his rooms to be used for playing billiards by other than regular guests. If he allowed the tables to be used for hire he would be guilty of a violation of the ordinance and, of course, be subject to prosecution and punishment in the same way, and to the same extent, as the defendant.

Affirmed.